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NO. _____

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JOHN J. CARDEN, a/k/a, JAMES J. CARDEN, and GLORIA (EUSEK) CARDEN,

Petitioners,

vs.

THE STATE OF MONTANA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NO.

JOHN J. CARDEN, a/k/a, JAMES J. CARDEN, and GLORIA (EUSEK) CARDEN,

Petitioners,

vs.

THE STATE OF MONTANA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioners, JOHN J. CARDEN a/k/a JAMES J. CARDEN, and GLORIA (EUSEK) CARDEN, respectfully pray that a Writ of Certiorari issue to the United States Court of Appeals for the Ninth Circuit to review a final order reversing the District Court's order granting petitioners' habeas corpus relief on the ground that the petitioners have failed to exhaust their State Court remedies.

QUESTIONS PRESENTED FOR REVIEW

On May 12, 1978, the United States District Court for the District of Montana, Helena Division, issued a writ of

habeas corpus enjoining the State of Montana from further prosecution of petitioners who were charged with a six count amended information filed by the State of Montana on the grounds the State of Montana had denied petitioners their constitutional right to a speedy trial. On appeal by the State of Montana, the United States Court of Appeals for the Ninth Circuit reversed the decision of the District Court and dismissed the writ on the grounds that petitioners had failed to exhaust their State Court remedies. The questions presented here relate solely to the doctrine of exhaustion. Those questions are:

1) When the State prosecutor in answer to a petition for writ of habeas corpus in a Federal District Court admits that the petitioning defendants have exhausted their State Court remedies on the constitutional issue before the Court and proceeds in litigating the merits of the petition, has the State not waived its right to challenge the District Court's jurisdiction on the ground that petitioners have failed to exhaust their State Court remedies?

2) Is the exhaustion requirement in habeas corpus proceedings arising from State Court prosecutions a matter of comity or of jurisdiction?

3) When petitioners, prior to filing an application for a writ of habeas corpus in the United States District Court, have fully and finally presented the constitutional question to the highest Court in the State and from which there is no further State forum to present that claim, have they not in fact exhausted their State Court remedies?

4) Since the issue of exhaustion was never raised by the State of Montana in the District Court proceedings, may a Court of Appeals decide the appeal before it on an issue not presented to the Court below?

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NINTH CIRCUIT. The opinion of the Court below in this case [Appendix pp. A1-A6] has not yet been reported.

The order denying petitioners' timely filed petition for rehearing en banc [Appendix p. A19] has not yet been reported.

DISTRICT COURT. The memorandum and opinion of the District Court granting petitioners' application for a writ of habeas corpus and other appropriate relief [Appendix pp. A7-A18] was not reported.

The memorandum and order denying the State of Montana's motion to amend findings and judgment or in the alternative for a new trial [Appendix pp. A20-A22] was not reported.

JURISDICTION

The judgment of the Court of Apeals [Appendix pp. A1-A6] was filed on the 20th day of June, 1980, a timely petition for rehearing was denied on September 8, 1980 [Appendix p. A19]. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the exhaustion requirement in habeas corpus proceedings by persons in custody pursuant to a judgment of a State Court in violation of the Constitution of the laws or treaties of the United States.

The statute describing the exhaustion requirement in

habeas corpus proceedings is 28 U.S.C. §2254, which reads in pertinent part as follows:

> "(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
>
> (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

STATEMENT OF THE CASE

Rule 21 1(g) of the Supreme Court Rules mandates that the statement of the case contain only the facts material to the consideration of the questions presented. Since the finding of the District Court that the petitioners had been denied their Federal Constitutional rights to a speedy trial was not appealed by the State of Montana to the Ninth Circuit Court of Appeals, the facts supporting the District Court's findings on that issue are not pertinent to this application. The only issue raised by the State of Montana on appeal to the Circuit Court and the only issue ruled upon by the Circuit Court was the issue of exhaustion of State Court remedies. Therefore, petitioners will limit the facts presented in this application to the facts supporting their claim that they have exhausted their State Court remedies.

On August 8, 1977, CARDENS, petitioners herein, filed

with the United States District Court for the District of Montana, Helena Division, a petition for a writ of habeas corpus and other appropriate relief [Appendix pp. A23-A62] that they had been denied their Federal constitutional right to a speedy trial; that they had further been denied the Fifth Amendment rights under the United States Constitution in that they had been victims of a bad faith prosecution by the State of Montana; and that they had been denied equal protection of the laws under the color of State authority contrary to the Fourteenth Amendment to the United States Constitution. In Paragraph VII of their petition [Appendix pp. A23-A62] CARDENS alleged that they had exhausted their State Court remedies. CARDENS specifically alleged as follows:

> "That the petitioners have exhausted their remedies available in the Courts of the State of Montana, by moving the District Court of Lewis and Clark County for dismissal of the information charging them with crimes against the State of Montana for failure to afford them their constitutional right to speedy trial. This motion was granted on the 28th day of July, 1976. The State of Montana appealed the District Court's decision dismissing the information to the Montana Supreme Court which was originally heard on the 22nd day of October, 1976, and re-argued on the 9th day of February, 1977. On the 25th day of May, 1977, the Montana Supreme Court reversed the District Court ruling holding that petitioners were not denied their constitutional right to a speedy trial under the Constitution of the State of Montana or the Constitution of the United States. Rehearing was denied on the 4th day of August, 1977.***"

The State of Montana filed its answer to petition for writ of habeas corpus on the 8th day of September, 1977 [Appendix pp. A23-A62]. In its answer the State of Montana admitted

that CARDENS had exhausted their remedies available in the State Courts. Specifically the State of Montana answered as follows:

> "6. Respondents admit that the Petitioners have exhausted their remedies available in the State Court as to the period of time from the filing of the information until the Motion to Dismiss for lack of speedy trial was made on May 11, 1976, but deny that the Petitioners have exhausted their remedies for any period of time thereafter; Respondents admit that the Montana Supreme Court has expressly ruled that these Petitioners were not denied their constitutional right to a speedy trial under the constitution of the state or the United States, for the time period of December 20, 1974, through May 11, 1976."

Furthermore, in its answer [Appendix pp. A63-A67] the State of Montana affirmatively alleged that CARDENS had exhausted their State Court remedies and that it was "prepared to proceed" in the District Court on the issue presented by the CARDENS' application.

Following extensive discovery under Rules 6 and 7 of the "RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS", effective February 1, 1977, oral argument and the submission of briefs the District Court issued its Memorandum and Order [Appendix pp. A7-A18] on May 12, 1978, granting CARDENS a writ of habeas corpus. In its order the District Court specifically addressed the exhaustion issue and held that the admission by the State of Montana that CARDENS had exhausted their State Court remedies was fatal. The District Court said in pertinent part:

> "***Here, the State concedes that all state remedies are exhausted for the period in question. This concession is fatal to the State's argument for abstention and against

> the stay, since it necessarily implies that the interest underlying the exhaustion requirement has been vindicated. If no further state forum exists in which the petitioner can present his constitutional claim, the State's interest in passing on constitutional questions arising from state cases has been fully protected."

On July 25, 1978 the District Court denied the State of Montana's motion to amend findings and judgment of the District Court or in the alternative for a new trial [Appendix pp. A68-A71]. Thereafter on the 18th day of August, 1978, the State of Montana filed a notice of appeal to the United States Court of Appeals for the Ninth Circuit. The State of Montana did not appeal the District Court's order granting the CARDENS a writ of habeas corpus on its merits but rather appealed only the procedural issues of exhaustion, permitting discovery, and granting a stay of State Court proceedings.

The first time the State of Montana raised the exhaustion issue was after the District Court had granted the CARDENS their writ of habeas corpus. In their answer brief filed with the Ninth Circuit Court of Appeals the CARDENS strongly objected to raising the exhaustion issue at this stage of the case. Quoting from pages 5-6 of their brief CARDENS voiced their objections as follows:

> "*** Now, after the petition for habeas corpus has been fully litigated on its merits and, more importantly after it was granted, the State of Montana desires to change its theory of the case. For the first time it raises the procedural rule of failure to exhaust state remedies even though it had admitted throughout the District Court proceedings that the Cardens had in fact fulfilled the exhaustion requirements set forth in 28 U.S.C. §2254 and by case law U.S.C. §2241. *Moore v. DeYoung,* 515 F.2d 437, 442 (C.A.3rd-1975). This new theory of the case comes at a time after the parties and the court

have expended substantial resources in litigating the merits of the petition. This action by the State of Montana constitutes a substantial turnabout in the theory relied upon by it during the District Court proceedings. Moreover, it violates the universally recognized doctrine of adherence to theory pursued below. *Roberson v. U.S.,* 382 F.2d 714 (9th Cir.-1967)."

On June 20, 1980, the Ninth Circuit Court of Appeals filed its Opinion reversing the District Court's Order granting CARDENS' habeas corpus relief on the grounds that CARDENS had not exhausted their State Court remedies [Appendix pp. A1-A6].

On September 8, 1980, the Ninth Circuit Court of Appeals denied CARDENS' timely filed petition for rehearing en banc.

REASONS WHY WRIT OF CERTIORARI SHOULD BE GRANTED

I.

THE NINTH CIRCUIT COURT OF APPEALS' DECISION IN THIS CASE ON THE QUESTION OF EXHAUSTION IS IN DIRECT CONFLICT WITH DECISIONS RENDERED BY THE FOURTH, FIFTH AND SEVENTH CIRCUIT COURT OF APPEALS.

On August 8, 1977, CARDENS filed with the United States District Court for the District of Montana, Helena

Division, a petition for writ of habeas corpus and other appropriate relief [Appendix pp. A23-A62]. In paragraph VII of their petition CARDENS alleged that they had exhausted their remedies available in the Courts of the State of Montana on the constitutional claims raised in their petition.

On September 8, 1977, the State of Montana filed its "Answer to Petition For Writ of Habeas Corpus", [Appendix pp. A63-A67], in the District Court. In paragraph 6 of its answer the State of Montana admitted that the CARDENS had exhausted their remedies available in the State Courts on the constitutional claim presented in the petition.

Following the filing of the petition and answer the parties engaged in extensive discovery under Rules 6 and 7 of the "RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS". Briefs were submitted and oral argument was held.

On May 12, 1978, the District Court issued its "Memorandum and Order" [Appendix pp. A7-A18], granting CARDENS a writ of habeas corpus. In its order the Court addressed the exhaustion issue and held that the State of Montana's concession that the CARDENS had exhausted all State remedies for the period in question on the constitutional claim presented in the petition was fatal.

Only after the parties and the Court expended substantial resources in litigating the merits of the petition and only after the District Court ruled on the merits did the State of Montana begin to retract its admission that the CARDENS had exhausted their State Court remedies.

On appeal the Ninth Circuit Court of Appeals reversed the District Court's order granting CARDENS a writ of habeas corpus on the grounds that they had failed to exhaust their State Court remedies [See Opinion, Appendix pp. A1-A6].

In the case of *Houston v. Estelle*, 569 F.2d 372 (5th Cir.-1978), rehearing denied 572 F.2d 320, the Fifth Circuit Court of Appeals faced an almost identical case on the issue of exhaustion. The Fifth Circuit Court held that because the State of Texas had admitted in its answer to the petition for habeas corpus relief filed by the petitioners, it had waived the exhaustion requirement. *Houston, supra,* 569 F.2d at pp. 375-376.

In *Houston, supra,* a State Court prisoner petitioned the United States District Court for the Western District of Texas for a writ of habeas corpus pursuant to 28 U.S.C. §2254. Following an evidentiary hearing the District Court denied the writ. Petitioner appealed to the Fifth Circuit Court of Appeals. On appeal the Court was compelled to determine whether the petitioner had exhausted his State remedies before making application for Federal habeas corpus relief.

The Court found that the State of Texas has never raised any procedural objection to Federal consideration at the District Court level and upon examination of the State's answer to the petition it had stated explicitly (569 F.2d at 372):

> "At this time, respondent does not contend that petitioner has failed to exhaust his state remedies. Although neither allegation now presented was brought up in his state writ, both were presented on direct appeal."

The *Houston* Court also found that the State had fully participated in the District Court proceedings and acquiesced in the expenditure of substantial resources in litigating the case on its merits.

In setting forth the principles governing habeas corpus exhaustion requirements and the Court's jurisdiction over

Federal habeas corpus claims the Court said in part, at 569 F.2d 375-376:

> "In deciding whether the merits of *Houston's* claim are properly before us, we must be mindful that *the question is not one of federal power, but of equitable discretion. Francis v. Henderson,* 425 U.S. 536, 96 S. Ct. 1708, 1710; 48 L. Ed. 2d 149 (1976); *Fay v. Noia,* 372 U.S. 391; 83 S. Ct. 822, 826-27, 9 L. Ed. 2d 837 (1963); *see Wainwright v. Sykes,* 433 U.S. 72, 97 S. Ct. 2497, 2511 n.4, 53 L. Ed. 2d 594 (Stevens, J., concurring); *Id* at 25134 n.2 (Brennan, J., dissenting).
>
> * * *
>
> *Since the exhaustion requirement is non-jurisdictional, it may be waived by the state, Collins v. Estelle,* 474 F.2d 988, 989, (5th Cir.-1973), *and we may give consideration to the expenditure of federal judicial resources below. Thomas v. Arizona,* 356 U.S. 390, 78 S. Ct. 885, 886-87 n.1, 2 L. Ed. 2d 863 (1958)." (*Emphasis Supplied*).

Applying those principles to the facts in *Houston* the Court held:

> "Thus, the state has never even made the argument which prevails, if at all, only as a matter of comity and has instead acquiesced in the expenditure of substantial resources in litigating the merits. In these circumstances, we hold that *Houston's* claim is properly before us. *To hold otherwise, we think would be to elevate a rule of equitable discretion, into one of jurisdiction.*" (*Emphasis Supplied*).

Clearly, the Fifth Circuit Court of Appeals' decision in *Houston* and the Ninth Circuit Court of Appeals in the present case are in conflict. The Fifth Circuit Court of Appeals holds that if the State admits exhaustion and proceeds to litigate the petition on its merits expending substantial resources of time then the reasons for the

exhaustion requirement have been met. The Ninth Circuit Court of Appeals holds that exhaustion of State Court remedies is an absolute requirement even though the State may have admitted exhaustion and even though the parties and the Court have expended substantial resources in litigating the merits of the petition.

Furthermore, the Fourth Circuit Court of Appeals in *Jenkins v. Fitzberger,* 440 F.2d 1188 (4th Cir.-1971) held that a State may waive the exhaustion requirement on the grounds that the exhaustion requirement of 28 U.S.C. §2254 is a matter of comity and *not* jurisdiction.

Similarly, the Seventh Circuit Court of Appeals in *United States Ex Rel. Lockett v. Illinois Parole and Pardon Board,* 600 F.2d 116, 117-118 (7th Cir.-1979) implied that it would not have dismissed a habeas corpus proceeding on the grounds petitioners had failed to exhaust State Court remedies if the State had explicitly waived the exhaustion requirement and had participated in a hearing in the merits of the petition.

In its opinion in *United States Ex Rel. Lockett, supra,* 600 F.2d at 117-118, the Seventh Circuit Court of Appeals analyzed decisions rendered by the various Circuit Courts of Appeals on the issue. In its analysis the Court found that the Fifth and Fourth Circuits have said that a State may waive the exhaustion requirement. On the other hand it found that the First, Second and Eighth Circuits have said that the exhaustion requirement cannot be waived by counsel. However, the Court found that the Second and Eighth Circuit Courts of Appeals may in appropriate circumstances not require exhaustion if there has been a full hearing below and exhaustion would be wasteful of judicial resources. The

Court said, *United States Ex Rel. Lockett, supra,* 600 F.2d at 117-118:

> "The Second Circuit has said that (w)e do not consider that the statutory requirement of exhaustion of state remedies can be waived by the State." *United States Ex Rel. Sostre v. Festa,* 513 F.2d 1313, 1314 n.1 (2d Cir. 1975); cf. *United States Ex Rel. Johnson v. Vincent,* 507 F.2d 1309 (2d Cir. 1974); *United States Ex Rel. Wissenfeld v. Wilkins,* 281 F.2d 707 (2d Cir. 1960). *Since the exhaustion requirement is not jurisdictional, United States Ex Rel. Wilson v. Rowe,* 454 F.2d 585 (7th Cir. 1971), *certiorari denied,* 406 U.S. 909, 92 S. Ct. 1618, 31 L. Ed. 2d 820 (1972), *an appeals court may in appropriate circumstances decline to dismiss despite the failure to exhaust, as where there has been a full hearing below and exhaustion would be "wasteful of judicial energy." Sostre, supra.* In *Howard v. Sigler,* 325 F. Supp. 278 (D. Neb. 1971), reversed on other grounds, 454 F.2d 115 (8th Cir. 1972), the State never raised the exhaustion issue at all and participated in a full federal evidentiary hearing on the merits. The district court, raising the exhaustion issue sua sponte, felt that the State's participation in that prior hearing foreclosed it from subsequently raising the exhaustion defense. *Where there has not been a prior hearing and where the State has not explicitly waived the exhaustion requirement, the Eighth Circuit rule is to require exhaustion. Blackwell v. Wolff,* 454 F.2d 48 (8th Cir. 1972). Compare *Jenkins v. Fitzberger, supra,* and *Houston v. Estelle, supra,* where the waiver was explicit." (*Emphasis Supplied*).

In the present case the State of Montana explicitly waived the exhaustion requirement in paragraph 6 of its answer to the petition [Appendix pp. A63-A67]. Moreover in its answer the State of Montana declared [Appendix pp. A63-A67]:

> "***The Respondents [State of Montana] are prepared to proceed in this Court on the issue presented by the

> Petitioners as confined to the time period encompassed by the Montana Supreme Court opinion, i.e., December 20, 1974 to May 11, 1976, and as to that time period, would ask that this Court dismiss their Petition for the reasons set forth by the Montana Supreme Court."

Furthermore, extensive discovery was undertaken by the parties including interrogatories, depositions and production of documents. Finally, a full hearing was held in District Court at which time attorneys for both parties presented arguments. The District Court then took the case under advisement, reviewed the briefs and other documentation and prepared its written Memorandum and Order granting petitioners a writ of habeas corpus. [Appendix pp. A7-A18]. This required the expenditure of substantial judicial resources by the District Court.

There can be no question that the several Circuit Courts of Appeals are in disagreement as to whether or not the exhaustion requirement can be waived by the State. However, the Second, Fourth, Fifth, Seventh and Eighth Circuit Courts of Appeals appear to agree that when there has been an explicit waiver by the State and the State has participated fully in litigating the merits of the petition requiring the expenditure of substantial judicial resources by the District Court as was done in the present case, the Court may properly decline to dismiss the case.

Since the several Circuit Courts of Appeals have rendered decisions in conflict with the Ninth Circuit Court of Appeals in the present case, this issue is properly before this Court. CARDENS respectfully request that this Court issue a writ of certiorari in this case to prevent future confusion and to prevent the extreme hardship imposed upon them by the Ninth Circuit Court's decision.

II.

PETITIONERS HAVE EXHAUSTED THE REMEDIES AVAILABLE IN THE COURTS OF THE STATE OF MONTANA ON THE CONSTITUTIONAL CLAIMS PRESENTED BEFORE PETITIONING THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, HELENA DIVISION, FOR A WRIT OF HABEAS CORPUS.

Title 28 of the United States Code Section 2254 sets forth the exhaustion requirement in habeas corpus proceedings arising out of State Court prosecution. 28 U.S.C. §2254 provides in pertinent part:

> "(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State Court shall not be granted unless it appears that the applicant has exhausted the remedies available in the Courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
>
> (c) An applicant shall not be deemed to have exhausted the remedies available in the Courts of the State, within the meaning of this section, *if he has the right under the law of the State to raise, by any available procedure, the question presented.*" (*Emphasis Supplied*).

CARDENS in the present case did in fact exhaust their State Court remedies on the constitutional claim that they had been denied their United States Constitutional right to a speedy trial.

On December 20, 1974, the Attorney General of the State of Montana filed a 19 count information against the CARDENS in State District Court. After deliberate tactical

delays on the part of the State of Montana, trial was set to be held on June 17, 1976. (See District Court's Memorandum and Order - Reason for Delay [Appendix pp. A7-A18]).

On May 11, 1976, CARDENS moved the State District Court to dismiss the information for lack of a speedy trial. On July 28, 1976, the State District Court granted CARDENS motion to dismiss for the State's failure to grant CARDENS their constitutional right to a speedy trial. The State of Montana appealed the order of dismissal to the State's highest Court - The Montana Supreme Court. The Montana Supreme Court reversed the District Court's order. CARDENS' timely petition for rehearing before the Montana Supreme Court was denied on July 27, 1977.

When the Montana Supreme Court reversed the District court's order dismissing the information on the grounds CARDENS had been denied their constitutional right to a speedy trial and after denying CARDENS request for rehearing, *there was no available procedure under the laws of the State of Montana to raise the constitutional question presented.* 28 U.S.C. §2254(c). The issue was *res judicata* having been finally determined by the highest Court in the State.

Clearly, the CARDENS had fully exhausted their State Court remedies on the constitutional question presented to the United States District Court in their petition for a writ of habeas corpus. The underlying reasons for declining jurisdiction were not present.

CONCLUSION

For the foregoing reasons, Petitioners/CARDENS' Petition For A Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit should be granted.

Respectfully submitted,

KNIGHT, DAHOOD, McLEAN & EVERETT

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN J. CARDEN, a/k/a JAMES J. CARDEN, and GLORIA (EUSEK) CARDEN,	)	
Petitioners-Appellees,	)	No. 78-3095
v.	)	DC. No. CV-77-61-H
STATE OF MONTANA,	)	OPINION
Respondent-Appellant.	)	

On Appeal from the United States District Court
for the District of Montana

Before: Goodwin and Farris, Circuit Judges and Taylor*, District Judge:

FARRIS, Circuit Judge:

The State of Montana is appealing from the district court's grant of appellees' pretrial petition for habeas corpus. The district court found that appellees John and Gloria Carden had been denied their constitutional right to a speedy trial and that habeas relief was proper because the Cardens had exhausted their state remedies. We reverse.

*The Honorable Fred M. Taylor, Senior District Judge for the District of Idaho, sitting by designation.

I. FACTS

The Cardens were charged with crimes related to Gloria Carden's $5,000 worker's compensation award. The information was filed on December 20, 1974. Because of a lengthy procedural delay caused by the actions of both the prosecution and the defense, the Cardens moved for a dismissal alleging a violation of their constitutional right to a speedy trial.

A Montana State trial court granted the Cardens' motion, but the Montana Supreme Court reversed. The Cardens then petitioned the United States District Court for habeas corpus relief. The district court ordered discovery and found as a fact that the State had disqualified a state trial judge for tactical purposes after he had been on the case for seven months. The district court concluded that the State bore the greater responsibility for the delay and that the delay had prejudiced the Cardens. Accordingly, the court held that, despite their own contribution to the delay, the Cardens' constitutional right to a speedy trial had been violated.

The State conceded at the district court hearing that the Cardens had exhausted their state avenues for asserting their speedy trial claim prior to trial. Relying on this concession, the district court concluded that pretrial federal habeas relief was not inconsistent with the established principles of comity and federalism which underlie the doctrine limiting federal interference with state proceedings.

The State is now challenging the issuance of the habeas writ on the ground that the district court, as a matter of comity, should not have entertained the Cardens' petition.

II. DISCUSSION

The central issue is whether comity precluded the district court from intervening, prior to trial, in the State's criminal prosecution of the Cardens. The State concedes that the district court had jurisdiction, under 28 U.S.C. §2241, to issue the pretrial writ of habeas corpus. As an exercise of judicial restraint, however, federal courts elect not to entertain habeas corpus challenges to state court proceedings until habeas petitioners have exhausted state avenues for raising federal claim.

Where a petitioner seeks pre-conviction habeas relief, this exhaustion prerequisite serves two purposes: (1) to avoid isolating state courts from federal constitutional issues by assuring those courts an ample opportunity to consider constitutional claims; and (2) to prevent federal interference with state adjudication, especially state criminal trials.[1] *Braden v. 30th Judicial Circuit Court of Kentucky,* 410 U.S. 484 (1973). The Court in *Braden* reaffirmed the established rule that federal adjudication of an affirmative defense prior to a state criminal trial violated the second of these two purposes and was thus prohibited by principles of comity unless the petitioner could show that "special circumstances" warranted federal intervention. *Id.* at 489.

Prior to *Braden,* we adhered to this rule as a logical implication of the abstention doctrine announced in *Younger v. Harris,* 401 U.S. 37 (1971) which precludes federal injunctions of pending state criminal prosecutions absent

[1]The Third Circuit described these two principles as "(1) the normal requirement that state appellate courts be given the initial opportunity to consider the federal constitutional claim; and (2) the teaching of *Younger v. Harris,* 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971)" *Moore v. DeYoung,* 515 F.2d 437, 439 (3d Cir. 1975).

"extraordinary circumstances." In *Drury v. Cox,* 457 F.2d 764, 764-65 (9th Cir. 1972), we stated that "only in the most unusual circumstances is a defendant entitled to have federal interposition by way of injunction or habeas corpus until after the jury comes in, judgment has been appealed from and the case concluded in the state courts."

The Cardens have not demonstrated the type of "special circumstances" which warrant federal intervention. The "special circumstances" exception to the general rule against pre-conviction federal intervention was discussed by the Supreme Court in a companion case to *Younger v. Harris.*

> Only in cases of proven harassment or prosecutions undertaken by state officials in bad faith without hope of obtaining a valid conviction and perhaps in other extraordinary circumstances where irreparable injury can be shown is federal injunctive relief against pending state prosecutions appropriate.

Perez v. Ledesma, 401 U.S. 82, 85 (1971).

The Cardens maintain that the prosecution harassed them by charging them with nineteen counts when only six were required. The state courts dismissed the unnecessary counts, and the Cardens are now seeking to avoid trial on those six counts found to have been properly charged. The district court concluded that charging the Cardens with too many counts was "unfair," but it did not accept their allegation that this constituted harassment. Under such circumstances, the filing of the multiplicious information does not warrant federal pretrial intervention.

The Cardens also argue that the State's use of the Montana judge disqualification statute for tactical purposes constitutes "special circumstances." The district court found that, by using the disqualification statute in this way,

the State was responsible for "deliberate delay" which weighed heavily against the State in determining whether it had violated the Cardens' speedy trial right. This does not satisfy the requirement that the Cardens show that the State, by its use of the disqualification statute, prosecuted them in "bad faith without hope of obtaining a valid conviction." While the "deliberate delay" finding may bear on the merits of the Cardens' speedy trial claim, it does not determine the appropriateness of federal intervention.

Further, the Cardens have not shown how they will be irreparably injured by waiting until after trial to assert their speedy trial claim. We agree with the Third Circuit's conclusion in *Moore v. DeYoung,* 515 F.2d 437 (3d Cir. 1975) that, unlike the Double Jeopardy Clause, the Speedy Trial Clause, when raised as an affirmative defense, does not embody a right which is necessarily forfeited by delaying review until after trial. This conclusion is supported by *United States v. McDonald,* 435 U.S. 850 (1978) in which the Court held that a federal district court's denial of a pretrial speedy trial motion to dismiss was not appealable before trial because it lacked finality. Rather than requiring pretrial review, the court in *McDonald* indicated that a speedy trial claim is best reviewed after trial when the district court's dismissal is more conclusive and allegations of prejudice are less speculative.

Because the Cardens have not demonstrated "special circumstances" warranting federal interference with Montana's criminal prosecution, we need not decide whether the state courts had sufficient opportunity to consider the speedy trial claim to satisfy the first purpose of the exhaustion doctrine identified in *Braden.* We note, however, that the Cardens make the unsupported assertion that "[t]here was no available procedure under the laws of

the State of Montana by which the Cardens could raise the constitutional questions presented." Although the State does not rebut this contention, we are unconvinced in light of the *McDonald* court's discussion of the nature of the speedy trial right, that the Montana state courts would refuse to reconsider their rejection of the Cardens' claim after the trial has demonstrated the extent to which the Cardens were prejudiced by the delay. Accordingly, the Cardens' appropriate remedy is to proceed to trial and thereafter raise their speedy trial claim[2] if they wish to do so.

In reversing the district court's grant of habeas relief, we are neither rejecting the merits of the Cardens' Sixth Amendment claim nor totally denying them a federal forum to assert it. We hold that under the circumstances before us, federal interference with the state proceeding was premature and thus inconsistent with the dictates of our federal system.

Reversed.

[2]Requiring the Cardens to stand trial before seeking a federal forum for their speedy trial claim is consistent with the position taken by the Second Circuit in *United States ex rel. Scranton v. State of New York*, 532 F.2d 292 (2d Cir. 1976).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

IN THE MATTER OF THE APPLICATION OF:	)	
	)	CV-77-61-H
JOHN J. CARDEN a/k/a JAMES J. CARDEN and GLORIA (EUSEK) CARDEN,	)	MEMORANDUM AND ORDER
FOR A WRIT OF HABEAS CORPUS and OTHER APPROPRIATE RELIEF.	)	

I. FACTS.

Petitioners are State Court defendants charged by a six-count amended information. The charges stem from alleged fraud and conspiracy in connection with a Montana Worker's Compensation claim. The State criminal case was dismissed in the State District Court because petitioners had been denied a speedy trial. The Montana Supreme Court reversed. *State v. Carden,* ____ Mont. ____, ____ P.2d ____, 34 St. Rep. 420 (1977). The petitioners then filed an application for a writ of Habeas Corpus in this Court, seeking a direction to the Montana Court to dismiss the case.

The petitioners' motion for a stay of State proceedings under 28 U.S.C. §2251 was granted by order of this Court on September 20, 1977.

On December 20, 1974, the attorney general of the State of Montana filed an information charging the defendants in State District Court. The information involved nineteen counts. Judge Gordon Bennett took jurisdiction of the case.

On January 9, 1975, Judge Bennett recused himself and Judge Nat Allen thereafter assumed jurisdiction at Judge Bennett's request. On February 10, 1975, the defendants filed fifty-six motions attacking the information. A briefing schedule was established, and subsequently twice revised on motion of the State.

On August 4, 1975, after the defense motions were briefed and argued, and some seven months after Judge Bennett had recused himself, the State moved to disqualify Judge Allen. Judge Allen denied the motion but was thereafter disqualified by an order of the Montana Supreme Court. Judge Jack Shanstrom assumed jurisdiction on September 30, 1975. He was disqualified by the defendants on November 3 of that year.

On December 9, 1975, Judge Paul Hatfield assumed jurisdiction. A hearing on the fifty-six defense motions was set for February 4, 1976. Judge Hatfield subsequently entered an order dismissing thirteen counts of the information but granting the State leave to file an amended information. On April 21, the State filed an amended information charging six counts corresponding to the remaining counts in the original information.

Following a hearing on May 4, Judge Hatfield established a pretrial schedule which contemplated a trial date of June 17, 1976. On May 11, 1976, the defendants moved to dismiss the information for lack of a speedy trial. Twenty-

five pretrial motions attacking the amended information, plus a motion to sever the trial of Gloria Carden from that of John Carden, were filed by defendants. On June 8, 1976, on motion of the defendants, Judge Hatfield removed himself from the case.[1]

Judge James Sorte assumed jurisdiction of the case. He denied all pending pretrial motions attacking the information but after hearing the speedy trial motion on July 28, 1976, the amended information was dismissed for failure to grant a speedy trial.

The State appealed the order dismissing the information. The dismissal order was reversed, *State v. Carden, supra.* Justice Haswell, writing for a majority of three, held that the 544-day delay between filing the information and the trial date established a prima facie case of denial of a speedy trial. However, evaluating the case in accordance with the guidelines set forth in *Barker v. Wingo,* 407 U.S. 514 (1972), the Court found the prima facie case had been rebutted. The Montana Court concluded that little of the delay was actively attributable to the prosecution, noting that the delay resulted "primarily from the exercise of statutory procedural rights inherent in Montana's criminal justice system for which neither the state nor the defendants are chargeable . . . ." 34 St. Rep. at 430.

While the reason for the delay was important, apparently the crucial factor to the Court was defendant's assertion of his right to a speedy trial. The Supreme Court found the defendants were unprepared for trial when the motion to dismiss was filed and reasoned that such facts indicated the defendants did not want a speedy trial. In its decision, the

[1]The motion was based on the fact that Judge Hatfield was then campaigning for Chief Justice of the Montana Supreme Court.

Court conceded that the delay had caused substantial personal prejudice to the defendants, but found that the reasons for the delay and the lack of assertion of the right outweighed the prejudice.[2]

II. EXHAUSTION.

Title 28 U.S.C. §2254 permits a person in state custody to attack the custodial order of the state court in federal court by means of a writ of habeas corpus. There are three conditions precedent to jurisdiction under §2254: (1) The applicant must be "in custody"; (2) the custody must be pursuant to a state court order; and (3) the applicant must have exhausted all possible opportunities to raise the claim at the state level.

The State does not deny that the petitioners are in custody pursuant to a State Court order. It is admitted that for the period from the date the original information was filed, through the date Judge Sorte's order of dismissal was entered, the petitioners have exhausted their state remedies.

The basis of the exhaustion requirement is to allow state courts to rule on constitutional claims arising from state proceedings. *See, United States ex rel. Scranton v. New York,* 532 F.2d 292 (2nd Cir. 1976). The Montana Supreme Court has ruled that the delay from December 20, 1974, through June 28, 1976, did not deny the petitioners a speedy trial. It has not ruled on a longer period, from

[2]In addition, the petitioners raise an equal protection claim, alleging that the Montana Supreme Court denied them equal protection of the law by affirming speedy trial claims in cases with shorter delays while reversing the petitioners' claim. This claim is without merit. Speedy trial cases are necessarily decided based on their own facts. *Barker v. Wingo,* 407 U.S. 514, 528-29 (1972). It is not a denial of equal protection to decide such cases on an ad hoc basis.

December 20, 1974, through August 8, 1977, the date when the instant petition was filed. As such, consideration of the speedy trial question is here limited to the period between the filing of the state charge and the district court's entry of the dismissal order.

The State argues that this Court ought not to stay a pending state court proceeding absent a showing of special circumstances. While it is true that *Younger v. Harris,* 401 U.S. 35 (1971), and *Moore v. DeYoung,* 515 F.2d 437 (1971), stand for the proposition of federal abstention in some cases, this case is distinguishable. In both the cited cases, the petitioners had not exhausted their state remedies before turning to federal court. Here, the State concedes that all state remedies are exhausted for the period in question. This concession is fatal to the State's argument for abstention and against the stay, since it necessarily implies that the interest underlying the exhaustion requirement has been vindicated. If no further state forum exists in which the petitioner can present his constitutional claim, the State's interest in passing on constitutional questions arising from state cases has been fully protected.

III. SPEEDY TRIAL.

Sixth Amendment speedy trial claims are governed by *Barker v. Wingo,* 407 U.S. 514 (1972). In the *Barker* case, the facts reveal Barker and Manning were charged with a homicide. Trial of the defendants was severed, the State fearing that without Manning's testimony a conviction against Barker would be impossible. Manning was tried five times over a period of more than four years before he was convicted. Barker spent all but ten months of this time free on bail. He was then tried and convicted. Barker failed to object

to continuances during the first three and one-half years of the Manning case. Finally, on the twelfth continuance, he objected and moved to dismiss for lack of a speedy trial. He appealed his case through the state appellate system, and then brought a federal habeas corpus action. The writ was denied at both the district and circuit courts, and the Supreme Court affirmed.

The Court rejected a rigid approach to speedy trial, adopting instead a test which balanced four factors: (1) The length of the delay; (2) the reason for the delay offered by the government; (3) the defendant's assertion of his speedy trial right; and (4) the existence of prejudice. The Court found none of these to be "a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial." 407 U.S. at 533. Rather, the Sixth Amendment requires balancing of these and other relevant factors before a decision on the question can be reached.

In *Barker,* the Court found the five-year delay from indictment to trial to be substantial enough to trigger the balancing process. The Court also found that the reasons offered to justify the delay were not compelling. However, the Court determined from the record that bad faith or malice in the delays was nonexistent; no delay was purely for the purpose of injuring the defendant's case. The Court noted the substantial, unnecessary delays were overbalanced by the defendant's delayed assertion of his right and the absence of prejudice. In such circumstances, the balance tipped in favor of the State.

The Montana Supreme Court found the delay of nineteen months between the filing of the information and the trial date sufficient to trigger consideration of the other factors identified in *Barker.* While the Ninth Circuit has not adopted a rigid rule regarding the amount of delay necessary

to trigger the *Barker* test, *cf. e.g., United States v. Jones,* 524 F.2d 834, 849 (D.C. Cir. 1975) (D.C. rule that a six-month delay triggers the inquiry), it has held that a delay as short as ten months will trigger a "careful analysis" under *Barker. Paine v. McCarthy,* 527 F.2d 173, 176 (9th Cir. 1975). It is therefore clear that the delay in this case is substantial enough to require inquiry into possible constitutional violations.

A. **Reason for the delay.**

It is clear that a large portion of the nineteen-month pretrial delay in this instance is attributable to the Montana judge-disqualification law. §95-1709 R.C.M., 1947. Both the State and the defendants exercised a statutory, peremptory disqualification. Additionally, two judges stepped aside of their own accord, one on motion of the defendant. The disqualification of most concern here was the State's disqualification of Judge Allen. When disqualified, Judge Allen had been on the case seven months and a decision on the defense motions was imminent. The State's timing in exercising its challenge of Judge Allen is questionable. An examination of the discovery documents in this case reveals that the decision to disqualify Judge Allen was reached in order to gain a tactical advantage over the defendants.[3]

Barker teaches that there are graduations under which delays attributable to the State are to be classified. Delays resulting from bad faith, or deliberate delays to gain a tactical advantage, are weighed most heavily against the State. Negligent delays are weighed less heavily, as are institu-

[3]*See,* Depositions of Richard Dzivi, Robert Woodahl, and Affidavit of Judge Allen.

tional delays such as overcrowded courts.[4] 407 U.S. at 531; *see also,* Opinion of White, J., concurring, 407 U.S. at 536-38. Here, the imposition of responsibility for causing "deliberate delay" must weigh heavily aginst the State.

The defendants also characterize the original information as "an oppressive, multiplicitous 19 count information." It is alleged that the filing of nineteen counts, rather than the six counts which were filed in the amended complaint, amounted to harassment, and that delays resulting from the number of counts should therefore weigh heavily against the defendants. I find that filing nineteen counts when but six are required is unfair, if not violative of the "good faith" requirements of Mont.R.Civ.P. Rule 11.

The reasons for the delay in bringing petitioners to trial must weigh heavily against the State.[5]

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[4]There is authority that delay for no justifiable reason should weigh heavily against the State. *See, Morris v. Wyrick,* 516 F.2d 1387 (8th Cir. 1975).

[5]The Montana Supreme Court's holding on "neutral delay", delay caused by the system, is not consistent with this Court's reading of the cases. The Court held that delays inherent in the system are not chargeable against the state. This is inconsistent with the holding in *Barker.* The D.C. Circuit stated the rule as follows:

> The Supreme Court has held that delays due to the operation of the system also must be placed at the Government's door, stating in *Barker v. Wingo:*
>
> > A defendant has no duty to bring himself to trial; the State has that duty as well as the duty of insuring that the trial is consistent with due process . . . . [T]he rule we announce today, which comports with constitutional principles, places the primary burden on the courts and the prosecutors to assure that cases are brought to trial.
>
> *United States v. Jones,* 524 F.2d 834, 849 (D.C. Cir. 1975).

B. The defendants' assertion of right.

In *Barker,* the Supreme Court found no violation of the applicant's right to a speedy trial. Even though the delay was substantial and unjustified, the Court found that failure to assert the right and lack of prejudice weighed heavily against the defendant. The Court found in particular that Barker did not want a speedy trial and was in fact content to sit back and hope that his co-defendant, Manning, would be acquitted, since the state conceded it could not convict Barker without Manning's testimony. Barker's failure to object to eleven continuances over the period of more than four years was found to be fatal. The Court stated:

> We do not hold that there may never be a situation in which an indictment may be dismissed on speedy trial grounds where the defendant has failed to object to continuances . . . . But barring extraordinary circumstances, we would be reluctant indeed to rule that a defendant was denied this constitutional right on a record which indicates, as does this one, that the defendant did not want a speedy trial.
>
> 407 U.S. at 536.

The Montana Supreme Court relied heavily on this rationale in reversing Judge Sorte's order of dismissal. The Court found that the defendants sat on their speedy trial rights for 507 days before asserting them for the first time on a motion to dismiss. It was further found that the defendants were not ready for trial, in that they had not even commenced their pretrial discovery. The Court found specifically that "the record in this case amply demonstrates that the defendants did not really want a speedy trial." 34 St.Rep. at 428.

The difficulty with this conclusion is the "amply

demonstrate[d]"[6] language. To hold that the defendants failed to assert their speedy trial rights by objecting to the various continuances requested by the State would be inconsistent with the burdens of getting a case to trial, articulated in *Barker*. *Barker* makes clear that the state bears the ultimate responsibility for bringing a defendant to trial. The petitioners' case is more difficult if there is no objection to the slow pace of the proceedings early in the game.[7] However, the ultimate burden still rests on the State's shoulders. The State's failure to seek a speedy disposition of its criminal charges must weigh against it and not the defendants, *Barker v. Wingo, supra.*

C. **Prejudice.**

The right to speedy trial is designed to protect three major interests: "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." 407 U.S. at 532. While prejudice against any one of these interests may suffice to weigh in the defendants' favor, it is clear that impairment of the defense is the most important. *Id.* Here, petitioners' allegation of prejudice stems from the

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[6]Justice Daly in dissenting wrote:

"[The majority's conclusion that the defendants did not want a speedy trial] is an exceedingly transparent effort to bring this case within the result of Barker . . . . [A] search of the record fails to disclose any evidence to support this gratuitous statement . . . ."

34 St.Rep. at 433 (Daly, J., dissenting).

[7]In *Barker*, the Supreme Court disavowed the so-called "demand-waiver rule" whereby a party who fails to demand a speedy trial is deemed to have waived it. 407 U.S. at 528.

effects of the anxiety and concern resulting from the delay on the health of the petitioners.[8]

Anxiety and concern are present to some degree in every trial. Therefore, a defendant must establish something more than normal anxiety in order to show prejudice. *United States v. Shepherd,* 511 F.2d 119, 123 (5th Cir. 1975). Here the defendants did so by testimony before Judge Hatfield on May 17, 1976. *See,* Petitionrs' Brief, R. Document 21 at 16-20. It appears that the health of both the petitionrs has been adversely affected by the delay. Thus the petitioners has been adversely affected by the delay. Thus the factor of prejudice weighs in petitioners' favor.

D. **The Balance.**

The decision in this case rests on the degree to which petitioners have shown the factors to be considered weigh in their favor.[9]

Here, the length of the delay tips decidedly in favor of the petitioners. The evidence adduced in support of the petition

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[8]Judge Sorte found both actual and presumptive prejudice from the delay. The Montana Supreme Court conceded this to some degree. 34 St.Rep. at 429.

[9]But *see, United States v. Lockett,* 526 F.2d 1110 (7th Cir. 1975). The Court there stated:

> [W]e disagree with the trial court's determination that defendant's failure to assert his right constituted a significant negative factor in the balancing process . . . . Where a lengthy delay occurs in the interval between arrest and indictment, normally there would be no reason to require defendant speedily to assert a demand for his own indictment and trial.
>
> 526 F.2d at 1111-12.

Here, the defendants were charged by information *before* they were arrested, so the exception mentioned in *Lockett* would not apply.

also reveals that at the crucial juncture of this case the State exercised a challenge to the state judge presiding over the case at the time, and that such challenge was done to gain tactical advantage of the state defendants. Finally, petitioners have shown the requisite prejudice against them, caused by the delay in bringing this case to trial. As the Court noted in *United States v. Jones,* 524 F.2d 834, 850 (D.C. Cir. 1975), the defendant has no duty to bring himself to trial; that burden belongs to the state and is in addition to the burden of seeing that the state trial is consistent with the due process of law. Therefore,

IT IS ORDERED that petitioners' request for a writ of Habeas Corpus be, and the same hereby is, granted.

IT IS FURTHER ORDERED that the State of Montana, and the Attorney General, be, and they hereby are, enjoined from further prosecuting the above-named petitioners and the State charges brought against them.

The Clerk is directed to notify the parties of the entry of this order.

Done and dated this 12th day of May, 1978.

/s/ James F. Battin

United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN J. CARDEN, a/k/a JAMES J. CARDEN, and GLORIA (EUSEK) CARDEN,	)	
Petitioners-Appellees,	)	No. 78-3095
v.	)	DC. No. CV-77-61-H
STATE OF MONTANA,	)	ORDER
Respondent-Appellant.	)	

Before: GOODWIN and FARRIS, Circuit Judges and TAYLOR*, District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Goodwin and Farris have voted to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

*The Honorable Fred M. Taylor, Senior District Judge for the District of Idaho, sitting by designation.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

IN THE MATTER OF THE APPLICATION OF:	)
JOHN J. CARDEN a/k/a JAMES J. CARDEN and GLORIA (EUSEK) CARDEN,	) CV-77-61-H
FOR A WRIT OF HABEAS CORPUS and OTHER APPROPRIATE RELIEF.	) MEMORANDUM AND ORDER

On May 12, 1978, this Court entered an order granting petitioners' request for a Writ of Habeas Corpus. The order of May 12 further enjoined the State of Montana and its Attorney General from prosecuting the above-named petitioners in any state charges pending against them. On May 23, 1978, the respondent, pursuant to Rules 52 and 59 of the Rules of Civil Procedure, filed a motion to amend the Findings and Judgment of the Court or, in the alternative, for a new trial. The motion has now been fully briefed by both parties and is before the Court for consideration and decision. My review of the issues raised gives no reason to amend the judgment previously entered. The principal contention of the respondent seems to rest on its reliance on

the case of *United States v. MacDonald,* ____ U.S. ____, 46 U.S.L.W. 4395 (May 1, 1978), decided by the United States Supreme Court sufficiently close to the time of the decision in this case that it was not considered by the Court. A careful reading of the *MacDonald* decision reveals that it is inapplicable to the case at hand. The fundamental distinction between *MacDonald* and the present case is that there, the Court was dealing with the question of interlocutory appeal in federal criminal litigation. The Court found that federal Courts of Appeal do not have the jurisdiction to review district court orders denying a defendant's motion to dismiss an indictment on speedy trial grounds, before trial. As the Court noted:

> In keeping with what appear to be the only two other federal cases in which a defendant has sought pretrial review of an order denying his motion to dismiss an indictment on speedy trial grounds, we hold that the Court of Appeals lacked jurisdiction to entertain respondent's speedy trial appeal.
>
> *United States v. MacDonald, supra* at 4397.

The *MacDonald* decision deals with the applicability of 28 U.S.C. § 1291. That section is not applicable to this case. Here, the petition for Writ of Habeas Corpus in the federal district court was filed after an exhaustion of state remedies wherein the matter of speedy trial was litigated. The jurisdictional statute and relevant case law to the case at hand is set forth in 28 U.S.C. § 2254 and cases cited thereunder.

The Cardens have exhausted the state remedies available to them. The state district court had granted Carden's motion to dismiss on the Sixth Amendment speedy trial question. The state's high tribunal reversed that court's order dismissing the information and found that the Cardens had not

been denied their Sixth Amendment right to a speedy trial. Cardens petitioned for a rehearing on the issue; the petition was denied on July 27, 1977. Thereafter, the Montana Supreme Court decision became the law of the case, *State v. Zimmerman,* 34 St.Rept. 1561 (1977), and thus, there is no available procedure under the laws of the State of Montana wherein the Cardens could raise the constitutional question presented and still protect their right to a speedy trial. The case of *United States v. MacDonald, supra,* is inapplicable to habeas corpus cases arising from state court adjudications and judgments. Therefore,

IT IS ORDERED that the motion of respondent State of Montana to amend Findings and Judgment of this Court, or in the alternative the motion for a new trial, be, and the same hereby are, denied.

The Clerk is directed to notify the parties of the entry of this order.

Done and dated this 25th day of July, 1978.

/s/ James F. Battin

United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

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IN THE MATTER OF THE
APPLICATION OF:

JOHN J. CARDEN a/k/a
JAMES J. CARDEN and NO. CV 77-61-H

GLORIA (EUSEK) CARDEN,

FOR A WRIT OF HABEAS
CORPUS AND
OTHER APPROPRIATE
RELIEF.

PETITION

I

Your petitioners, JOHN J. CARDEN, a/k/a JAMES J. CARDEN and GLORIA (EUSEK) CARDEN, are citizens of the United States, residents of the County of Clackamas, State of Oregon, and were charged with crimes in Lewis and Clark County, State of Montana, in this District on the 20th day of December, 1974.

II

That your petitioners are now actually, unjustly and unlawfully restrained of their liberty and detained under color of authority of the State of Montana in the custody of Rick Westlund, Sheriff of Lewis and Clark County, Montana, in said District.

III

That the sole claim and authority by virtue of which petitioners are restrained of their liberty is a judgment of the Montana Supreme Court, State of Montana, rendered on the 25th day of May, 1977, in which the petitioners were ordered to stand trial. A copy of the judgment is marked Exhibit "A" and is attached hereto and made a part hereof.

The judgment and order are void and without authority of law and the restraint of liberty of the petitioners is a denial of due process of law, and further a denial of their constitutional rights to a speedy trial under the Sixth and Fourteenth Amendments of the Constitution of the United States and hereinafter shown.

IV

The petitioners were charged by information in the District Court of Lewis and Clark County, State of Montana, on the 20th day of December, 1974. On May 4, 1976, arraignment of the petitioners was set to be held on May 17, 1976. The period between the time of filing the information and time set for arraignment is 514 days. The petitioners

have been denied their United States constitutional right to a speedy trial under the Sixth and Fourteenth Amendments and their Montana Constitutional right to a speedy trial under Art. II, §24, 1972 Montana Constitution.

The length of delay has resulted in great prejudice to the petitioners. They have been restrained of their liberty since January 3, 1975, by being under the obligation to appear at all times and places as ordered by the Court. They have been fully apprised of the penalty in the event they fail to appear upon being so ordered. Moreover, the delay has interfered greatly with employment opportunities, drained their financial resources, detrimentally affected friendships and association with others, subjected them to public hostility and caused great mental, emotional and psychological anxiety to each of them and to their family and friends. These facts were established in the State proceeding, are part of the record, uncontroverted and establish prejudice beyond any presumption.

The State of Montana District Court granted the motion to dismiss for lack of speedy trial on July 28, 1976 for the reasons set forth in the opinion of District Judge M. James Sorte and a copy of that order and judgment dismissing with prejudice and memorandum is attached hereto as Exhibit "B" and made a part of this petition and in that memorandum of the said District Judge the following statement is judicially declared:

> "Uncontradicted testimony given by Defendants at a hearing held May 17, 1976, in Great Falls, Montana, clearly establishes prejudice beyond the presumption."

The State has never justified the delay in this case nor ever explained why a single transaction should be expanded into 19 multiplicitous and oppressive counts so as to engender expected delay and then after harassing and prejudicing the

defendants through this type of multiplicitous and oppressive charging of crime then voluntarily and ex parte request the District Judge 422 days later to reduce the charges from 19 counts to six (6) counts. All of the activities of the State of Montana which have generated the claimed unreasonable delay is without justification and a violation of its duty and responsibility to protect the Federal constitutional right of the petitioners to a speedy trial.

That in addition to the 514 day delay from the time of the filing of the charges until the time for arraignment on May 17, 1976, additional time passed and the trial date was set thereafter and the final arguments on the motion in the State District Court to dismiss for lack of speedy trial was argued and granted on July 28, 1976. The State of Montana promptly filed notice of appeal on August 1, 1976 and briefs promptly submitted by both the State and the defendants and the case was argued to the Montana Supreme Court on October 22, 1976. The argument related to the sole issue of whether the petitioners herein were denied their State and Federal Constitutional right to a speedy trial and notwithstanding the fact that this was the only issue for argument and decision the matter was not decided during the balance of 1976 and the case was then set for re-argument on February 9, 1977 and again only that single issue as to speedy trial was argued and presented once again for appellate decision. The Montana Supreme Court as set forth in the attached opinion decided the issue against the petitioners on May 25, 1977. The petitioners filed for rehearing on June 13, 1977 and opposition to the petition for re-hearing was promptly filed by the State.

The petition for re-hearing was not denied and such denial communicated to the petitioners until August 4, 1977. The appellate process of the State of Montana with respect to the

sole issue of speedy trial consumed 369 days and the total time that has now elapsed since the information was filed against the petitioners on December 20, 1974 is the grand total of 957 days.

That during all of this time because of the "political nature" of this case the petitioners have suffered the prejudice herein set forth and described and this type of delay is without justification and is a clear and unquestioned violation of their constitutional right as American citizens to a speedy trial.

V

The petitioners have further been denied their United States Constitutional rights under the Fifth and Fourteenth Amendments by being victims of bad faith prosecution under color of authority of the State of Montana. The State of Montana, through its officers and agents have used the criminal justice system in the State of Montana to harass, intimidate and coerce the petitioners contrary to the Constitution of the United States. That the prosecution has been conducted in bad faith as to these petitioners has been shown to the United States District Court FOR THE DISTRICT OF MONTANA, HELENA DIVISION, in the case of WILLIAM T. KELLY vs. ROBERT F. WOODAHL, Attorney General of the State of Montana, CV-76-55-H. Petitioners request that the Court take judicial notice of the record and deem it a part of this petition by this reference.

VI

As a separate and distinct ground for issuing petitioners' a writ of Habeas Corpus, petitioners allege they have been denied equal protection of the laws under the color of State authority contrary to the Fourteenth Amendment to the United States Constitution in that they have been discriminated against by the State of Montana. That they have been singled out and treated differently from all other criminal defendants in the State of Montana and there can be no explanation for such discrimination other than the one pointed out by Justice Daly of the Montana Supreme Court in his dissent in STATE OF MONTANA v. JOHN J. CARDEN a/k/a JAMES J. CARDEN and GLORIA (EUSEK) CADEN, 34 St. Rptr. 420, 430-439 (1977) where he wrote that the only visible reason for treating this case differently from all other cases involving defendants who have been denied their Constitutional right to a speedy trial in the State of Montana was because this case is a "political" case. A copy of the Montana Supreme Court's opinion and Justice Daly's dissent are attached hereto as Exhibit "A" and by reference made a part hereof.

VII

That the petitioners have exhausted their remedies available in the Courts of the State of Montana, by moving the District Court of Lewis and Clark County for dismissal of the information charging them with crimes against the State of Montana for failure to afford them their constitutional right to speedy trial. This motion was granted on the 28th day of July, 1976. The State of Montana appealed the District

Court's decision dismissing the information to the Montana Supreme Court which was originally heard on the 22nd day of October, 1976, and re-argued on the 9th day of February, 1977. On the 25th day of May, 1977, the Montana Supreme Court reversed the District Court ruling holding that petitioners were not denied their constitutional right to a speedy trial under the Constitution of the State of Montana or the Constitution of the United States. Rehearing was denied on the 4th day of August, 1977. A copy of the Montana Supreme Court's opinion and order are attached hereto as Exhibit "A" and by reference made a part hereof.

WHEREFORE, the petitioners pray the Court to issue its Writ of Habeas Corpus addressed to Rick Westlund, Sheriff of Lewis and Clark County, State of Montana, ordering and directing him to have the bodies of the petitioners forthwith before the Court at that time that petitioners be discharged from further custody. They further pray that all proceedings in the District Court of Lewis and Clark County, State of Montana, be stayed pending the hearing and determination of this petition, and further ask that this Court prescribe the time of notice and direct to whom the notice of this application shall be given.

For the purpose of informing the Court they state that Mike Greely is the Attorney General of the State of Montana, in charge of their prosecution and his address is the Capitol Building, Helena, Montana, and that Robert S. Keller, of Helena, Montana, is Special Assistant Prosecutor, whose address is at the Capitol Building, Helena, Montana, and the sheriff in whose custody your petitioners

are held, is a resident of the City of Helena, County of Lewis and Clark, State of Montana.

DATED this 5th day of August, 1977.

By: Wade J. Dahood

Attorney for the petitioners
113 East Third Street
Anaconda, Montana 59711

STATE OF MONTANA]
ss.
County of Deer Lodge]

WADE J. DAHOOD, being first duly sworn, says that he is the Attorney of record for the petitioners in the foregoing action; that he has been authorized by petitioners to verify this petition; that he has read the foregoing petition and knows the contents thereof, and that the same is true to his own knowledge.

/s/Wade J. Dahood

SUBSCRIBED and SWORN to before me this 5th day of August, 1977.

/s/ May M. Preskar
Notary Public for the State of Montana residing at Anaconda. My commission expires 12-7-79.

EXHIBIT "A"

STATE REPORTER
Box 749
Helena, Montana

VOLUME 34

No. 13478

THE STATE OF MONTANA,

Plaintiff and Appellant,

vs.

Submitted: Feb. 16, 1977
Decided: May 25, 1977

JOHN J. CARDEN, a/k/a JAMES J. CARDEN and GLORIA (EUSEK) CARDEN,

Defendants and Respondents.

. . . . . .

CRIMINAL LAW, Charging Crimes Arising out of Workmen's Compensation Claim Settlement, Error in Trial Court's Dismissal for Lack of Speedy Trial, Four Principal Factors To Be Balanced in Determining whether Defendant Has Been Denied a Speedy Trial

Appealed from the First Judicial District Court, Lewis and Clark County, Hon. M. James Sorte, Judge Presiding.

For Appellant: Mike Greely, Attorney General, Helena
Robert S. Keller, Special Ass't Attorney General, Helena

For Respondents: Smith, Emmons, Baillie & Walsh, Great Falls Knight, Dahood & Mackay, Anaconda

Mr. Greely and Mr. Keller argued the case orally for Appellant, Mr. Robert J. Emmons for Respondents.

Opinion by Justice Haswell; Justice Shea and Hon. James M. Salanky, District Judge sitting for Justice Harrison, concurred; Justice Daly dissented; Hon. L. C. Gulbrandson, District Judge sitting for Chief Justice Hatfield, dissented in part.

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Mr. Justice Haswell delivered the Opinion of the Court.

Defendants James J. Carden and his wife Gloria Eusek Carden were charged with several crimes arising out of a $5,000 settlement of her Workmen's Compensation claim. The district court, Lewis and Clark County, dismissed the case on the ground that defendants had been denied their constitutional right to a speedy trial. The state appeals. We reverse.

On December 20, 1974, the attorney general filed a direct Information against the defendants in the district court of Lewis and Clark County. Defendant James J. Carden is the former administrator of the Workmen's Compensation Division, Department of Labor and Industry, of the State of Montana. Defendant Gloria Eusek Carden is the wife of defendant James J. Carden. The Information contained 19 counts charging defendant with the following crimes in connection with a $5,000 settlement of Gloria Eusek Carden's claim under the Workmen's Compensation Act: Embezzlement by a public officer; grand larceny; obtaining money or property by false pretenses; presenting false proofs on a policy of insurance; officer illegally interested in a contract; offering false or forged document to be recorded; preparing false evidence, and offering false evidence.

Defendants made their initial appearance on January 3, 1975, before District Judge Gordon R. Bennett. Defendants were granted additional time to brief the Information and were released on their own recognizance. On January 9, 1975, District Judge Nat Allen assumed jurisdiction of the case upon request of Judge Bennett.

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On January 17, 1975, Judge Allen granted defendants an extension of time to February 10 in which to file their motions and briefs. On February 10 defendants filed 56 motions attacking the Information in various particulars. Defendants received an extension of time to February 26 to file their supporting brief.

On March 18, Judge Allen revised the briefing schedule on defendants' motions to that defendants brief was due on April 21, the state's answering brief was due on May 21 and defendants' reply brief was due on May 30. The state contends this was done to synchronize the briefing schedule in this case with the briefing schedule in State v. James J. Carden, Cause #3937 in the district court. Defendants deny this.

On May 20, the state received an extension of time to June 4 to file its answering brief. Thereafter defendants received an extension of time to July 3 in which to file their reply brief.

On August 4, the state moved to disqualify Judge Allen resulting in an appeal to this Court. We ruled that Judge Allen was disqualified. On September 30, District Judge Jack D. Shanstrom assumed jurisdiction.

On October 21, Judge Shanstrom set all pending motions for hearing on November 17. On November 3, defendants disqualified Judge Shanstrom.

On December 9, District Judge Paul G. Hatfield assumed jurisdiction. Judge Hatfield set all motions by the defendants for hearing on February 4, 1976. At the hearing, Judge Hatfield requested counsel to submit proposed orders and requested the state to review its Information for consolidation of counts. According to the state, it subsequently

wrote Judge Hatfield suggesting that the Information could be reduced to 6 counts and the judge concurred.

On April 14, 1976, Judge Hatfield entered an order (1) dismissing 13 counts of the Information, (2) granting the state leave to file an amended Information, (3) indicating that many of the defendants' original motions were rendered moot by the dismissal of the 13 counts, and (4) setting a further hearing for April 27. This was subsequently continued to May 4 due to inclement weather.

In the meantime, on April 21, the state filed an amended Information containing 6 counts. In the amended Information the defendants were charged with 6 crimes generally corresponding to the remaining counts in the original Information. The crimes charged in the amended Information were: Embezzlement by a public officer; grand larceny; offering a forged or false document to be recorded; and preparing false evidence.

Following the hearing on May 4, Judge Hatfield set May 14 as the date for arraignment of defendants on the amended Information; May 17 was set for hearing further motions to be filed by defendants; and June 17 was set as the tentative trial date.

On May 11, defendants filed their motion to dismiss the case for denial of a speedy trial in violation of the Sixth Amendment to the United States Constitution and Art. II, Sec. 24, 1972 Montana Constitution.

On May 17, defendants presented the state with 25 motions attacking the amended Information; a motion to dismiss all charges because of prejudicial pretrial publicity; a motion for change of place of trial; a demand for production of documents for trial; a motion for production of documents;

and a motion to compel the state to furnish defendants with a copy of any oral or written confessions or admissions with a list of witnesses.

On May 27, defendant Gloria Eusek Carden moved for a severance of her trial from that of James J. Carden.

On June 8, Judge Hatfield, who was then engaged in a state-wide campaign for election as Chief Justice of this Court, removed himself from jurisdiction in the case, following a motion by defendants.

District Judge James Sorte then assumed jurisdiction and set all motions by defendants for hearing on June 17. Following hearing all motions by defendants were denied, except those relating to discovery. Trial was set for August 16.

On July 16, defendants requested a rehearing on the issue of a speedy trial. The rehearing was held on July 28, in Kalispell during the annual convention of the State Bar of Montana. Judge Sorte ruled from the bench that the case be dismissed for lack of a speedy trial. The state filed its notice of appeal the following day. On August 1, Judge Sorte filed a memorandum opinion setting forth the reasons for his ruling.

The appeal was originally argued on October 22, 1976 and reargued on February 9, 1977.

The sole issue on appeal is whether the defendants have been denied their constitutional right to a speedy trial. We note defendants have presented 16 additional issues for review relating to other pretrial aspects of the case, which we will not review at this time as the district court's dismissal is based exclusively on denial of a speedy trial.

Although the arguments of the respective parties on the

speedy trial issue consist of hundreds of pages of briefs filed in the district court and in this Court on appeal, we will endeavor to summarize the principal positions of the respective parties in brief, understandable form. In so doing, we will confine ourselves to the basic thrust of the arguments as we view them, directing our attention to the forest rather than the individual trees.

The defendants principally contend that they have been denied their constitutional right to a speedy trial under the principles enunciated by the United States Supreme Court in Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L. Ed. 2d 101, and our decisions in State v. Steward, 168 Mont. 385, 543 P.2d 178, 32 St.Rep. 1185; State ex rel. Sanford v. District. Ct., Mont. 551 P.2d 1005, 33 St.Rep. 644; and State v. Keller, ____ Mont. ____, 553 P.2d 1013; 33 St.Rep. 795. These cases generally involve a sensitive balancing of four principal factors in the individual case to determine whether a given defendant has been denied a speedy trial: (1) length of delay, (2) reasons for the delay, (3) assertion of the right by defendant, and (4) prejudice to defendant.

Defendants contend that when these four factors are properly evaluated and balanced under the circumstances of this case, defendants have clearly been denied their right to a speedy trial. They emphasize the length of the delay here is excessive and unreasonable; that the principal reason for the delay is the manner in which the state chose to prosecute the case by a 19 count Information covering an essentially simple factual transaction; that the duty is on the state to afford defendants a speedy trial, which defendants have neither waived nor consented to; and that defendants have

suffered severe actual prejudice by the failure of the state to bring them to trial within a reasonable time. In short, defendants claim the state is responsible and chargeable with unreasonably delaying the trial of defendants without justification entitling defendants to dismissal of the charges against them.

The basic position of the state, on the other hand, is that while the four factor balancing test of *Barker* and its Montana progeny *Steward, Sanford* and *Keller* is controlling, a proper evaluation and balancing of these factors demonstrates that defendants have not been denied a speedy trial within constitutional requirements. The state argues it has pursued the prosecution of this case with dispatch and cites several cases where delays substantially in excess of those here were held not to constitute violations of constitutional speedy trial guarantees: *Barker,* supra; United States v. Ewell, 383 U.S. 116, 86 S.Ct. 773, 15 L. Ed. 2d 627; United States v. Lane, 465 F.2d 408; United States v. Jones, 475 F.2d 322; United States v. Skeens, 494 F.2d 1050; United States v. Churchill, 483 F.2d 268; Ricon v. Garrison, 517 F.2d 628; United States v. Fairchild, 526 F.2d 185; United States v. Stein, 456 F.2d 844; Constabile v. State (Okla.Cr.), 513 P.2d 588.

The state emphatically denies that it is responsible or chargeable with the principal delays involved in this case, viz. the time necessarily consumed in researching, briefing, arguing, and securing a decision on the voluminous motions filed by the defendants and the time necessarily consumed incident to disqualification of judges by both the defendants and the state. The state further contends that the defendants

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have never sought a speedy trial and are not now prepared to go to trial. Finally, the state distinguishes *Steward, Sanford* and *Keller* but requests us to review our prior holdings in *Steward* and *Sanford* on assertion of the right to a speedy trial by defendants.

As a further preface to our decision herein, we note the prior rulings of the district court on defendants' motion for dismissal of this case for denial of a speedy trial. The district court initially denied defendants' motion. Subsequently a rehearing was granted and the district court granted defendants' motion. Briefly stated, the district court reasoned that the long delay in bringing the defendants to trial in this case established a prima facie case of denial of a speedy trial; that both presumptive and actual prejudice to defendants resulted from this delay; that three principal reasons accounted for the delay in this case (1) the Montana disqualification law and the procedural practicalities attendant on changing judges, (2) the filing of multiple counts (19) by the prosecution in a relatively simple factual situation, and (3) the state's disqualification of Judge Allen after he had considered the case for over 7 months; that none of these delays was chargeable to defendants; and therefore the defendants were entitled to dismissal for lack of a speedy trial. Implicit in the district court's reasoning although not specifically stated therein is the proposition that delays not chargeable to the defendants are the responsibility of the state.

The starting point in our analysis of the speedy trial issue is Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed. 2d 101, which both the state and the defendants concede is

controlling. *Barker* rejects the two arbitrary approaches to the issue of speedy trial in favor of a balancing test in this language:

> "We, therefore, reject both of the inflexible approaches—the fixed-time period because it goes further than the Constitution requires; the demand-waiver rule beause it is insensitive to a right which we have deemed fundamental. The approach we accept is a balancing test, in which the conduct of both the prosecution and the defendant are weighed." 407 U.S. 529, 530.

The substance of the balancing test in *Barker* is described in these words:

> "A balancing test necessarily compels courts to approach speedy trial cases on an ad hoc basis. We can do little more than identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right. Though some might express them in different ways, we identify four such factors: Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." 407 U.S. 530, 531.

Montana has adopted and applied the four factor balancing test in *Barker* in determining the speedy trial issue under Art. II, section 24, 1972 Montana Constitution, as well as under the United States Constitution in three principal cases: State v. Steward, supra; State ex rel. Sanford v. Dist. Ct., supra; State v. Keller, supra.

The length of the delay between the filing of the Information and the date set for trial (544 days) triggers the inquiry here. Barker v. Wingo, supra. It establishes a prima facie case of denial of a speedy trial. State ex rel. Sanford v. Dist.

Ct., supra. If this prima facie case remains unrebutted, the issue is settled. In this case, the state's rebuttal must be weighed and considered in the light of the four factor test of *Barker*.

The first factor to be considered is the length of the delay. In this case the state concedes that the time lapse is sufficient to trigger an inquiry into the other three elements of the balancing test. We agree. We note that speed alone is not the determining factor. Rather it is the manner in which the state has pursued the prosecution in the light of the totality of the circumstances in the case. The United States Supreme Court has placed this consideration in perspective in the following passage from United States v. Ewell, 383 U.S. 116, 86 S.Ct. 773, 15 L. Ed. 2d 647, 630:

> "However, in large measure because of the many procedural safeguards provided an accused, the ordinary procedures for criminal prosecution are designed to move at a deliberate pace. A requirement of unreasonable speed would have a deleterious effect both upon the rights of the accused and upon the ability of society to protect itself. Therefore, this Court has consistently been of the view that 'The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice.' * * * 'Whether delay in completing a prosecution * * * amounts to an unconstitutional deprivation of rights depends upon the circumstances * * *. The delay must not be purposeful or oppressive.' * * *' [T]he essential ingredient is orderly expedition and not mere speed.' "

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In our view the state has pursued the prosecution with reasonable diligence. There is little "dead time" in which nothing was done which distinguishes this case from *Steward, Sanford* and *Keller.* Although defendants argue the state could have proceeded more expeditiously had it chosen to charge the defendants with a single crime or no more than the 6 charges they eventually ended up with in the amended Information, this is largely speculative and unconvincing in light of the 25 motions filed by defendants attacking the amended Information and the additional discovery motions, venue motion, severance motion, and motion relating to pretrial publicity. In any event, we cannot say the law of Montana is so clear that the manner of charging defendants in this case rendered the initial filing of a 19 count Information in this case unreasonable. In our view the prosecution in this case has proceeded in orderly and unreasonable progression step-by-step toward trial under the criminal procedural statutes of this state.

The second factor to be weighed and considered under *Barker* involves the reasons for the delay. This has been partially touched upon in the preceding discussion. To be more precise, the principal delays in this case were occasioned by the time necessarily consumed in researching, briefing, and arguing defendants' 56 original motions, disqualification of judges by both the state and defendants with resulting procedural delays, requests for extension of time by both the state and defendants, and the late filing of briefs. We do not suggest for a moment that defendants were not entitled to file their 56 motions, disqualify 2 judges, or

request extensions of time. What we do say is that the resulting delays are not the responsibility of nor chargeable to the state.

This brings us to one of the principal bones of contention between the state and defendants. The state contends it is not chargeable with delays inherent in the criminal justice system in the absence of fault on its part. Defendants contend that such delays are chargeable to the state because it is the state's obligation to afford the defendants a speedy trial and the defendants have no control over the state's criminal procedure statutes or its criminal justice system.

We reject the basic approach to this problem taken by defendants and impliedly by the district court. This approach indicates that if defendant is chargeable with a given number of days delay, the state is automatically chargeable with the remainder without regard to other considerations. Such an arbitrary and mechanical approach is unreasonable and goes far beyond the speedy trial provisions of the federal and state constitutions. It leaves society naked of the means to protect itself in the face of any protracted and spirited defense. It is directly contrary to the four factor balancing test in *Barker* where the conduct of both the prosecution and the defendant is weighed under the circumstances of the particular case under consideration.

We have previously held the time reasonably consumed by a defendant's good faith motions requiring research, hearing and determination are not chargeable to defendant. State v. Keller, supra. Logic and reason compel application of the same rule to the state's good faith efforts.

In our view the circumstances of this case indicate no

intentional or deliberate delay by the state, an insignificant amount of "dead time", no "institutional delays" in the criminal justice system beyond the statutory procedural rights of the parties, and no substantial delays for which the state is responsible or chargeable.

The third factor in the balancing process, defendants' assertion of their right to a speedy trial, weighs most heavily against defendants under the circumstances of this case. Although failure to assert this right does not constitute a waiver of the right to a speedy trial, it is a factor to be considered in the balancing test. In *Barker* this consideration was expressed thusly:

> "* * * The defendant's assertion of his speedy trial right, then, is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right. We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." 407 U.S. 531.

In our view the record in this case amply demonstrates that the defendants did not really want a speedy trial. They first asserted this right after protracted proceedings resulting in dismissal of 13 of the 19 counts. For 507 days after they were charged, defendants failed to even hint they desired a faster pace in the proceedings. Defendants asked for and received extensions of time. They delayed for 40 days after the closing of filings for Chief Justice of this Court before seeking Judge Hatfield's removal because of his candidacy for a statewide elective judicial office.

At the time defendants filed their motions for dismissal for lack of a speedy trial, they had not pursued any pretrial

discovery and were in no sense ready for trial. Six days after filing their motions for dismissal for lack of a speedy trial, defendants filed, among other things, three pretrial discovery motions and a motion to change the place of trial. Fifteen days after filing their motion for dismissal for lack of a speedy trial, defendant Gloria Eusek Carden sought severance of her trial from that of her husband and codefendant. Under these circumstances defendants' claim of deprivation of a speedy trial loses its vitality. United States v. Churchill, 483 F.2d 268; United States v. Dornau, 356 F. Supp. 1091. The further circumstance that defendants waited until the eve of trial to file their motions illustrates the transparent nature of their claim that they were deprived of their constitutional right to a speedy trial. United States v. Churchill, supra; United States v. Fasanaro, 471 F.2d 717; United States v. Jones, 475 F.2d 322; United States v. Toy, 482 F.2d 741; Day v. State, 61 Wis.2d 236, 212 N.W.2d 489; United States v. Saglimbene, 471 F.2d 16.

The state requests us to review our prior holding in *Steward* and *Stanford* on the third factor in the *Barker* balancing process. The state reads these cases as holding that the filing of a motion to dismiss for lack of a speedy trial by defendant at his arraignment is a sufficient assertion of the right. *Steward,* unlike this case, involved essentially "dead time" between the filing of charges and arraignment and motion on the eve of trial so to speak; *Sanford* involved the failure of three different judges to set defendant's motion for hearing over an eight month period despite his repeated

requests. Although isolated statements in the opinions may support the state's view of what this Court held, these statements must be read and interpreted in the context of the facts of the case in which they were made. As the United States Supreme Court recently stated:

> "While it is possible to excise various portions of the plurality opinion to support the result reached below, divorcing the language from the facts of the case serves only to distort its holdings." Illinois v. Somerville, 410 U.S. 458, 469, 93 S.Ct. 1066, 35 L. ed. 2d 425, 434.

We view this as particularly true in speedy trial cases where each case must be considered on an ad hoc basis under its particular facts in applying the balancing test of *Barker*. We intended no elimination of the third factor in the *Barker* balancing test, but simply held that under the facts and circumstances of those particular cases, defendants had properly asserted their right.

The final factor in the balancing process involves the question of whether defendants were prejudiced by the delay. We need not belabor this point. Both presumptive and actual prejudice are present to some degree in this case.

Barker described the approach to this factor in this manner:

> "* * *Pejudice, of course, should be assessed in the light of the interests of defendant which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last,

> because the inability of a defendant adequately to prepare his case skews the fairness of the entire system. If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defense witnesses are unable to recall accurately events of the distant past. Loss of memory, however, is not always reflected in the record because what has been forgotten can rarely be shown." 407 U.S. 532.

Here there is nothing in the record to suggest that the defense has been impaired by the delay. There are no lost or missing witnesses. There is no showing of loss of memory.

There has been no pretrial incarceration, oppressive or otherwise.

There has been substantial anxiety and concern on the part of defendants. This has manifested itself physically, mentally and emotionally. It is perhaps more severe in this case than in the usual case. But this is an unusual case. We do not see how this anxiety and concern can be eliminated or minimized as far as these defendants are concerned until this entire workmen's compensation investigation and prosecution is completely finished.

In summary then, the circumstances of this particular case involve substantial delay resulting primarily from the exercise of statutory procedural rights inherent in Montana's criminal justice system for which neither the state nor the defendants are chargeable; that defendants' assertion of lack of a speedy trial has been belated and transparent, indicating that defendants did not really want a speedy trial and were not yet ready for trial when they filed their motion; and that prejudice has resulted to defendants from the delay in the

form of anxiety and concern. On the balance, we hold defendants have not been denied a speedy trial in the constitutional sense.

The order and judgment of dismissal is reversed. The case is remanded to the district court for trial.

. . . . . .

Mr. Justice Daly dissenting:

During oral argument the attorney general characterized this as *"a political case"*. It was not made clear what significance was intended. The majority here has scrupulously avoided any reference to the political background of this or related Workmen's Compensation cases but does set the case apart at p. 15 [p. 429 St.Rep.] of the opinion with "It is perhaps more severe in this case than in the *usual case.* But this is an *unusual* case." (Emphasis supplied.)

Appellate judges have said in the past that it is not necessary that a court pretend to be more ignorant than it actually is, nor more ignorant than the public generally. I believe this to be true. The political history and excessive media treatment has not escaped my notice. Be this as it may, I cannot agree that cases should be viewed or treated as political or unusual or whatever. This case is what it is, a single offense $5,000 fraud case, alleged by the state to be a crime. The kind of case where the facts, not names, are important. The kind of case the average county attorney sees frequently and disposes of within several weeks or a month with no problems.

The majority opinion relies almost exclusively on Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L. Ed. 2d 101

(1972), and I do not deny its authority. However, in explaining the application of *Barker* to the Montana cases of *Steward, Sanford* and *Keller,* the majority states at p. 6 [p. 423 St.Rep.] "These cases generally involve a sensitive balancing of *four principal factors* * * * (Emphasis added.) Again the majority states at p. 9 [p. 425 St.Rep.], that "Montana has adopted and applied the *four factor* balancing test in Barker * * *" (Emphasis added.) Further, that "In this case, the state's rebuttal must be weighed and considered in the light of the *four factor* test of *Barker.*" (Emphasis added.) Thus it is obvious that the majority oversimplifies the principles of *Barker.* The case is not so narrow and restricted as the majority would lead us to believe. In it, the United States Supreme Court stated:

> "We regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors which must be considered together with such other circumstances as may be relevant. In sum, *these factors* have no *tailsmanic qualities*; courts must still engage in a difficult and sensitive balancing process. But, because we are dealing with a fundamental right of the accused, this process must be carried out with full recognition that the accused's interest in a speedy trial is specifically affirmed in the Constitution." (Emphasis added.) 407 U.S. 533.

Many cases following *Barker* have recognized that the principles are not so constricted as the majority assumes. The foregoing quotation was set out and approved in its entirety in Moore v. Arizona, 414 U.S. 25, 94 S.Ct. 188, 38

L. Ed. 2d 183, 185, 186. As stated in United States v. Dreyer, 533 F.2d 112, 115:

> "* * * The Court emphasized that *it did not intend the list to be exhaustive* nor any one factor dispositive and that other *relevant circumstances should also be considered.*" (Emphasis added.)

It is the "other relevant circumstances" set forth above in this opinion, which cannot be ignored for a proper application of *Barker.*

The majority opinion purports to give full support to the rejection by *Barker* of the *"demand-waiver doctrine".* After doing so, however, the majority goes all the way around the horns of their dilemma and gives actual effect to the "demand-waiver" rule. For this reason, we should look at the United States Supreme Court's statement in connection with the rule in *Barker*:

> "Such an approach, by presuming waiver of a fundamental right from inaction, is inconsistent with this Court's pronouncements on waiver of constitutional rights. The Court has defined waiver as 'an intentional relinquishment or abandonment of a known right or privilege.'* * * * * * Courts should 'induldge every reasonable presumption against waiver.' * * * and they should 'not presume acquiescence in the loss of fundamental rights.' * * * In Carnley v. Cochran, 369 U.S. 506, 8 L.Ed.2d 70, 82 S. Ct. 884 (1962), we held:
>
> " 'Presuming waiver from a silent record is impermissible * * * there must be an allegation and evidence * * *' " 407 U.S. 525, 526.

By, in effect, applying the "demand-waiver rule", the

majority does further violence to the law enunciated in *Barker*:

> "The nature of the speedy trial right does make it impossible to pinpoint a precise time in the process when the right must be asserted or waived, but that fact does not argue for placing the burden of protecting the right solely on defendants. *A defendant has no duty to bring himself to trial; the State has that duty as well as the duty of insuring that the trial is consistent with due process.* Moreover, for the reasons earlier expressed, societ has a particular interest in bringing swift prosecutions, and society's representatives are the ones who should protect that interest." (Emphasis added.) 407 U.S. 527.

The majority opinion at page 7 [p. 424 St. Rep.] attempts to support its ultimate conclusion by citing the cases relied on by the state, wherein delays in excess of that Judge Sorte was confronted with were involved. It should be noted the only United States Supreme Court case cited is United States v. Ewell, 383 U.S. 116, 86 S.Ct. 773, 15 L. Ed. 2d 627, decided February 23, 1966, over 6 years prior to *Barker*. Since *Barker* is universally accepted as the Bible on speedy trial issues, and since it has been a foundation for the new federal rules and the decisions drastically reducing permissible delays in bringing a case to trial, any authority of "*Ewell*" is diluted, and to some extent superseded by *Barker*. Further, the facts in *Ewell* are not at all similar to those of the instant case, nor are the facts in the other cases cited by the state and the majority.

It should be noted also that the delay in *Ewell* was not "substantially in excess" of that in this case, as stated by the

majority. In this case, the time between the filing of the Information and the order of Judge Sorte was 585 days, as compared to 576 in *Ewell.* At any rate, the quotation of the majority from *Ewell* at page 10 [p. 426 St. Rep.] of the majority opinion, is not consonant with the national trend since 1966. The substance of the quotation is that unless prosecution is "purposeful or oppressive" in delaying a prosecution, there is no denial of a speedy trial. This is not the law under the 1972 *Barker* decision and the cases and rules applied since then. This has not been the law in Montana, *prior to the majority decision in this case.*

The majority opinion makes this charitable statement at p. 13 [p. 428 St.Rep.]:

> "*In our view the record in this case amply demonstrates that the defendants did not really want a speedy trial.*" (Emphasis added.)

This is an exceedingly transparent effort to bring this case within the result of *Barker,* but this case is in no manner or way similar under the facts of *Barker.* There, Barker was anxiously awaiting the outcome of trials and appeals in the related case of Manning, who was charged with the same crime. Barker was gambling that his case would be dismissed if Manning were eventually acquitted. The state obtained 16 continuances of trial dates, and Barker made no objection to 13 of these continuances. he thoroughly approved of the delays until he lost his bet. *There are absolutely no similar facts in this case.*

Moreover, a search of the *record fails to disclose any evidence to support this gratuitous statement of the*

majority. Likewise, if there was any issue of fact before Judge Sorte as to whether or not the Cardens wanted to go to trial, it is not apparent from the record. Under the established rules of appellate procedure *neither an issue of law nor an issue of fact can be raised for the first time on appeal.* The majority completely by-passes this principle.

The discretion vested in the trial court and the presumptions in the trial court's favor recognized in *Steward* seem to have no meaning in this case. This Court stated in *Steward*:

> "This Court has held many times that *all presumptions are in favor of the trial court's decision.* [Citing cases.] The district court had ample opportunity to view the record and determine the inferences to be drawn from the actions of the parties. *We find no substantial evidence on the record rebutting the presumption the district court acted properly in holding the actions of defendant and his attorney did not waive the right to a speedy trial.*" (Emphasis added.) 543 P.2d 183.

This Court further recognized the discretion vested in the trial court in connection with the question of dismissal with prejudice. In *Steward,* we said:

> "* * * The State may exercise discretion as to whether the accused will be reprosecuted. The trial court should possess similar discretion to disallow reprosecution if the prejudice caused the accused and his defense by the denial of a speedy trial would be compounded by a subsequent prosecution for the same offense." 543 P.2d 184.

If we continue to recognize the presumption in favor of the ruling of the trial court there is no basis for reversal on this

record. If the majority bases its holding on manifest abuse or lack of substantial evidence, it should so state.

The contention that the state has no responsibility for the time consumed in connection with defendants' 56 motions attacking the Information creates a bit of a "stench". There is no way or no case to support any angle the state can use to avoid responsibility for the time attendant to disposing 13 of the 19 counts. The majority opinion denies that "the initial filing of a 19 count Information in this case [was] unreasonable" at page 10 [p. 426 St.Rep.], but *the state admitted 13 counts were untenable.* To say they were improvidently filed would be undeservedly apologetic and charitable. (See also in this connection: sec. 3.9(c)(e) of Std. for Criminal Justice of American Bar Association and Disciplinary Rules 7-103A and 1-102(A)(4)(5); Montana Canons of Professional Ethics 3.9 (a)(c)(c).) See also: United States v. Pauline Pipe (Mont.), Havre-Glasgow Div., Federal District Court CR-77-10-HG, April 1977, for a discussion concerning repeated indictment as denial of due process which doctrine would not exclude application to untenable Information counts.

The majority further condemns the defendants in relation to the number of counts at p. 10 [p. 426 St.Rep.] of its opinion, saying "this is largely speculative and unconvincing in light of the 25 motions filed by the defendants attacking the amended Information and the additional discovery motions, venue motion, severance motion, and motion relating to pretrial publicity." This charitable statement seems to assume that all motions should be filed at the outset of the proceedings. After a declaration of "unusual case", I fail to

see any justification for the characterization "speculative and unconvincing" to describe motions relating to *venue* and *pretrial* publicity prior to the time the grounds had fully accrued, or not filing discovery motions prior to the time when it was determined whether or not the Information would be dismissed.

The majority on p. 9 [p. 425 St.Rep.], recognizes that 544 days between filing Information and trial date was sufficient to trigger an inquiry as to speedy trial in the following language:

> "*It establishes a prima facie case of denial of a speedy trial. State ex rel. Sanford v. Dist. Ct., supra. If this prima facie case remains unrebutted, the issue is settled.*" (Emphasis added.)

Having purported to recognize the rule, the majority emasculates it by ignoring that the burden is upon the state to rebut the presumption of a denial of a speedy trial and it is the duty of the state to bring the case to trial.

On p. 10 [p. 426 St.Rep.] of its opinion, the majority blandly states:

> "In our view the state has pursued the prosecution with reasonable diligence."

This statement cannot be justified by the record and particularly the state's belated disqualification of Judge Allen after presiding for 264 days, but, more than that, it sidesteps the issues. The question is not limited to whether the prosecution proceeded with "reasonable diligence" but whether or not the defendants were deprived of a constitutional right. If they were so deprived at *the hands of the*

state, it matters not whether it was the executive, legislative or judicial branch at fault. (In this regard, see admissions by state in Petition for Supervisory Control v. Arnold Olsen (Goldman dismissal), April 26, 1977.)

The majority states at p. 13 [p. 428 St.Rep.]:

"* * * The further circumstance that defendants waited until the *eve of trial* to file their motions illustrates the *transparent nature of their claim that they were deprived of their constitutional right to a speedy trial.*" (Emphasis added.)

Let us take a good look at the above statement and then compare it with the unanimous expression of the Court in *Steward.* It was there said:

"The 'appropriate motion' is a motion to dismiss for denial of a speedy trial. The proper time to assert the right to a speedy trial is *prior to the actual commencement of the trial, usually at the time the trial date is set, or the time the case is called to trial.* Morse v. Municipal Court, et al., 13 Cal.3d 149, 118 Cal. Rptr. 1, 529 P.2d 46. Defendant, in the instant case, made his motion to dismiss at the proper time." (Emphasis added.) 543 P.2ds 182.

We also stated in *Steward*:

"The district court here was correct in holding:

" '* * * *the Defendant's attorney would not be* representing the Defendant if he would raise the question of the fair speedy trial. This was incumbent upon the County Attorney to do so under the circumstances.' " (Emphasis added.) 543 P.2d 182.

Here, the "tentative trial date" was June 17, 1976 and on

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May 11, 1976 defendants filed their motion to dismiss for lack of a speedy trial. How does this differ from the law announced in *Steward*?

The majority attempts to circumvent *Barker* by constant reference to lack of "dead time", pp. 10, 12 and 14 [pp. 426, 427, 428 St.Rep.] of its opinion, apparently on the theory that if there is no extended interlude without some activity there can be no deprivation of a speedy trial. There is a very conspicuous lack of authority cited for this theory, and the only mention in *Barker* of "dead time" is in a totally different context. There Justice Powell observed:

> "* * * Most jails offer little or no recreational or rehabilitative programs. The time spent in jail is simply *dead time*." (Emphasis added.) 407 U.S. 532, 533.

Any application of this statement to the instant case is difficult to see or understand.

In passing I must comment that at p. 12 [p. 427 St.Rep.] of its opinion the majority takes the position that the state or "society" is left "naked of the means to protect itself in the face of any protracted or spirited defense." In light of the facts of this case, the statement can only be viewed as an apology for incompetence. If nothing else it is a new concept that the state needs protection from individual defendants. *Society* does have an interest in speedy trials, but it is not adversary. It is in upholding and protecting the integrity of the judicial system against the deficiencies and abuses of its agencies which are in total control of the state government. The defendants and society, rather than arch adversaries, are in a position of parallel interests. It is ludicrous to make the assertion, particularly in what the state has termed an

"unusual case" backed by state appropriation of approximately $1,933,737.00, against a handful of defendants. This imbalance is not a naked society but approaches tyranny.

The thread of misunderstanding runs all through the majority opinion and finally in the summary, p. 15 [p. 430 St.Rep.], asserts:

> "* * * the circumstances of this particular case involve substantial delay *resulting primarily from the exercise of statutory procedural rights inherent in Montana's criminal justice system for which neither the state nor the defendants are chargeable*" (Emphasis added.)

This statement like the rest of the opinion misses the principal point, that this is not a *one* or *single element matter,* such as how the prosecution proceeded, that controls. Rather it is the *total effect of the system.* If the "Montana criminal justice system" is so structured that a relatively simple, single transaction, alleged to be criminal, results in a 544 day delay of trial, then there has been a denial of a speedy trial, and it matters not whether it resulted in action or inaction by the courts, prosecution or legislature, or all in concert, the state is the system and totally responsible for "statutory procedures inherent in Montana's criminal justice system".

Again, the majority persists in ignoring the basic rule of *Barker*:

> "* * * But the rule we announce today, which comports with constitutional principles places the primary burden on the courts and the prosecutors to assure that cases are brought to trial. * * *" 407 U.S. 529.

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Again, on the matter of prejudice, I point out to the majority that:

(1) District Judge Sorte in the memorandum supporting his "order and judgment dismissing with prejudice" stated:

> "In this State the law is that long delay establishes a prima-facie case of denial of a speedy trial. This case, as of July 28, 1976, was 586 days from the date of the filing of the Information and is presently set for trial August 16th, 1976, which is 605 days. Sanford (July 8th 1976) held delay of ten months (299 days) between arraignment and trial establishes a prima-facie case of denial of the right to a speedy trial. That situation is present here as is the presumption of prejudice (Sanford v. District Court, 33 State Reporter 644, State v. Steward, 32 St. Reporter 1185 and cases cited. *Uncontradicted testimony given by defendants at a hearing held May 17, 1976, in Great Falls, Montana, clearly establishes prejudice beyond the presumption.* (See Exhibits admitted June 17, 1976.)"

(2) The state has offered no evidence to contradict this testimony.

(3) The state has the burden to not only produce proof of no prejudice but overcome the presumption of correctness of Judge Sorte's judgment.

(4) In State v. Keller, ____ Mont. ____, 553 P.2d 1013, 1017, 33 St.Rep. 795, 798, this Court again stated one of the major purposes of a speedy trial is to protect the accused in the following language:

> "In his concurring opinion in *Barker,* at page 121, Justice White emphasizes one of the major purposes in protecting the accused. Wholly aside from possible

prejudice to a defense on the merits, the accused will be subject to substantial restrictions on his liberty pending trial, either in jail or while free on bond, ' "* * * *that may* disrupt his employment, drain his financial resources, curtail his associations, subject him to public obliquy, and create anxiety in him, his family and his friends." ' U.S. v. Marion, 404 U.W. 307, 320, 92 S. Ct. 455, 463, 30 L. Ed. 2d 468, (1971)."

In United States v. Dreyer, 3 C.C.A. march 1976, 533 F.2d 112, 115, it was stated:

"This reading of *Barker,* which confines 'prejudice' to impairment to the defense, was explicitly rejected by the United States Supreme Court in Moore v. Arizona, 414 U.S. 25, 26-27, 94 S.Ct. 188, 189-190, 38 L.Ed.2d 183, 185-186 (1973) (per curiam). There the Court quoted approvingly from Justice White's concurriing opinion in Barker v. Wingo, supra, 407 U.S. at 537, 92 S.Ct. at 2195, 33 L.Ed.2d at 121:

" 'Inordinate delay "*wholly aside from possible prejudice to a defense on the merits,* may 'seriously interfere with the defendant's liberty, whether he is free on bail or not, and * * * may disrupt his employment, *drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends.*' " United States v. Marion, 404 U.S. 307, 320, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971). These factors are more serious for some than for others, but they are inevitably present in every case to some extent, for every defendant will either be incarcerated pending trial or on bail subject to substantial restrictions on his liberty.'

"The majority in *Barker* also recognized that an

> accused is *'disadvantaged by restraints on his liberty and by living under a cloud of anxiety, suspicion, and often hostility.'* Barker v. Wingo, supra, 407 U.S. at 533, 92 S.Ct. at 2193, 33 L.Ed.2d at 118. A proper reading of *Barker,* therefore, must include within the meaning of 'prejudice' any threat to what the Second Circuit recently has termed *'an accused's significant stakes—psychological, physical and financial*—in the prompt termination of a proceeding which may ultimately deprive him of life, liberty or property.' United States v. Roberts, 515 F.2d 642, 642 (2d Cir. 1975)." (Emphasis added.)

(5) Our files do not reveal the defendants are proceeding forma pauperis, but are using their own assets.

(6) Hence, the prejudice found and within the contemplation of *Barker, Marion* and *Dreyer* and adopted by Montana in *Keller,* has not been recognized by the majority beyond "this is an unusual case".

(7) There has been no burden established by the majority and no burden met by the state.

(8) The state has disposed of the entire issue of prejudice summarily and totally ignored the uncontroverted principle that the burden is upon the state to establish that there has been no prejudice. The majority in stating *"there is nothing in the record to suggest"* (Emphasis added.) any of these types of prejudice *has unwittingly conceded that the prejudice element must be resolved 100% in favor of defendants.* Even if the burden was on the defendants the conclusion of the majority would be untenable under the authority of *Dreyer* and cases cited therein, and *Keller.*

I would ask the majority in this opinion, what is the state of

the law as it has been announced in the many decisions setting forth the doctrine that the judgment of the district court is presumed to be correct and all doubt resolved in favor of the prevailing party on appeal. How are we to view the doctrine established by *Steward, Sanford* and *Keller*? Are they still the law *except* in "unusual" or "political cases"?

I, for the reasons stated, feel Judge Sorte's judgment should be affirmed.

. . . . . .

Hon. L. C. Gulbrandson, District Judge, sitting for Chief Justice Hatfield, agrees with the dissent of Mr. Justice Daly, to the extent said dissent imposes responsibility upon the State of Montana for "institutional delays" in the criminal justice system.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

IN THE MATTER OF THE APPLICATION OF:	)	CV-77-61-H
JOHN J. CARDEN a/k/a JAMES J. CARDEN and GLORIA (EUSEK) CARDEN,	)	ANSWER TO PETITION FOR A WRIT OF HABEAS CORPUS
FOR A WRIT OF HABEAS CORPUS AND OTHER APPROPRIATE RELIEF.	)	

The Respondents answer the Petition for a Writ of Habeas Corpus as follows:

1. Admit the allegations contained in Paragraph I of the Petition.

2. Admit that the Petitioners are restrained of their liberty to the extent that they have been released on bail.

3. Respondents deny that the sole claim for restraining Petitioners of their liberty is a judgment, but, as is set forth in Paragraph IV of the Petition, these Petitioners have been charged by information in a State District Court of having committed felony crimes against the State of Montana; that the judgment of the Montana Supreme Court marked Exhibit "A", attached to the Petition is correct, and Respondents deny the remaining allegations of Paragraph III of the Petition.

4. Respondents admit so much of the allegations of Paragraph IV as allege that the Petitioners were charged by information in the District Court of Lewis and Clark County, State of Montana, on December 20, 1974, and that there was an arraignment set to be held on May 17, 1976, and that the period between the time of filing the original information and the time set for arraignment on the *amended* information was 514 days; Respondents further admit that the State Trial Court granted the Defendants' Motion to Dismiss for lack of speedy trial on July 28, 1976, and generally admit the time table relative to the appeal to the Montana Supreme Court, including the denial of the Defendants' Petition for Rehearing on August 4, 1977; Respondents deny the remaining allegations, and allege affirmatively that following a multitude of defense motions to the original information, the state was granted leave to file an amended information, which reduced the original 19 counts to six counts, and the arraignment on the amended information was set to be held on May 17, 1976; that a trial date was then set for June, 1976, and the Defendants moved for a dismissal on the grounds of lack of speedy trial, and at the same time, asked that the trial Judge disqualify himself, which he did; the new trial Judge continued the trial, and then granted Defendants' Motion to Dismiss on July 28, 1976; the Petitioners are correct in stating that the argument to the Montana Supreme Court related solely to the issue of whether the Petitioners herein were denied their constitutional right to a speedy trial; this matter was argued to the Montana Supreme Court on October 22, 1976, and when no decision was reached at the end of the calendar year, and the Court was changed by virtue of the retirement of one of the Justices and the elections of 1976 for another Justice, reargument was set for February 16, 1977, before a new Court, and argued on that

date; that none of the delay alleged by the Petitioners from the date of making their motion for dismissal in the State Trial Court, in May, 1976, has been heretofore brought to the attention of any Court, much less made the basis for a dismissal of the charges on the grounds of lack of speedy trial, i.e., Petitioners, in the State Court, have urged that the delay from the time of filing the information on December 20, 1974, to the time of the motion for dismissal in May, 1976, should be the basis for a dismissal of the case, but these Petitioners have not made any motion in any State Court that any additional delay should be a basis for a dismissal. In other words, as to any delay following their first motion for a dismissal for lack of speedy trial, these Petitionrs have not exhausted their state remedies.

5. Respondents deny the allegations contained in Paragraph V and VI of the Petition.

6. Respondents admit that the Petitioners have exhausted their remedies available in the State Court as to the period of time from the filing of the information until the Motion to Dismiss for lack of speedy trial was made on May 11, 1976, but deny that the Petitioners have exhausted their remedies for any period of time thereafter; Respondents admit that the Montana Supreme Court has expressly ruled that these Petitioners were not denied their constitutional right to a speedy trial under the constitution of the state or the United States, for the time period of December 20, 1974, through May 11, 1976.

AFFIRMATIVE ALLEGATIONS

Respondents allege that as to the time period covered in the opinion of the Montana Supreme Court, annexed to the Petition, these Petitioners have exhausted their state

remedies, and there is no further *state* trial and appellant process, other than a direct appeal to the United States Supreme Court, which is presumably not available until the State Trial Court proceedings terminate in a conviction, that is upheld by the Montana Supreme Court; however, as to the remaining time period following May 11, 1976, which would include the arguments, briefing and deliberations by the State Trial Court upon the Defendants' motion for dismissal for lack of speedy trial, and the briefing, argument and deliberations of the Montana Supreme Court thereafter, there is an adequate state remedy through the state trial process available, and these Petitioners have not exhausted the state remedies. The Respondents are prepared to proceed in this Court on the issue presented by the Petitioners as confined to the time period encompassed by the Montana Supreme Court opinion, i.e., December 20, 1974, to May 11, 1976, and as to that time period, would ask that this Court dismiss this Petition for the reasons set forth by the Montana Supreme Court.

Dated: September 6, 1977.

Rick Westlund, Sheriff of Lewis and Clark County
Mike Greely, Attorney General of the State of Montana

By /s/ Robert S. Keller
Robert S. Keller, Special Assistant Attorney General
State Capitol Building
Helena, Montana 59601

CERTIFICATE OF MAILING

I, Robert S. Keller, do hereby certify that on the 6th day of September, 1977, I served the foregoing Answer to Petition for a Writ of Habeas Corpus upon the Defendants in the above-entitled case, by mailing a true and correct copy of said answer, first-class postage prepaid to:

Wade J. Dahood, Esq.
113 East Third Street
Anaconda, Montana 59711

Robert J. Emmons, Esq.
P. O. Box 2227
Great Falls, Montana 59401

/s/ Robert S. Keller

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

IN THE MATTER OF THE APPLICATION OF:	)	
	)	CV-77-61-H
JOHN J. CARDEN a/k/a JAMES J. CARDEN and GLORIA (EUSEK) CARDEN,	)	MOTION TO AMEND FINDINGS AND JUDGMENT, AND MOTION FOR A NEW TRIAL
FOR A WRIT OF HABEAS CORPUS and OTHER APPROPRIATE RELIEF.	)	

The Respondent moves the Court, pursuant to Rules 52 and 59, Rules of Civil Procedure, to grant an order amending the Findings of Fact and Judgment, or, in the alternative, to grant a new trial. Said motions are made for the following reasons:

I. That the Court erred in finding that the disqualification of Judge Allen involved a seven months' delay; that the

Findings of Fact should be amended to find that after Judge Allen had received all of the briefs relative to the various motions that have been filed, less than one month transpired before his disqualification.

II. That the Court erred in considering discovery documents and matters relative to the disqualification of Judge Allen that had not been previously presented in the State Court, nor made a part of the hearing thereof; that the Findings of Fact should be amended to delete any matters construed to have been determined as a result of those discovery documents.

III. That the Court erred in finding that the disqualification of Judge Allen was for the purpose of gaining a tactical advantage over the Petitioners; that the Court should find that any delay involved in the disqualification of Judge Allen was not occasioned for the purpose of delay, nor for the purpose of taking an unfair advantage of the Petitioners.

IV. That the Court erred in considering Petitioners' claim of a denial of Speedy Trial prior to judgment; that the Court erred in isolating a limited period of time involved in Petitioners' claim of denial of Speedy Trial, and considering that limited period of time, i.e, piecemeal review before final judgment; that the Court should have rejected Petitioners' claim until there had been the final judgment in the State Court.

V. That the Court erred in finding that the Petitioners' remedies were exhausted at the State level; that the Court should have found that the Petitioners' remedies were not exhausted at the State level until there had been a final judgment in the State Court.

VI. That the Court erred in failing to find that Judge Sorte denied Petitioners' Speedy Trial motion, and then on motion for rehearing, and without hearing any further evidence,

granted Petitioners' motion for a dismissal by reason of a denial of a speedy trial.

VII. That the Court erred in finding that the Montana Supreme Court had conceded that the delay had caused substantial personal prejudice to the Defendants (Court's Opinion, p. 3); that the Court more properly categorized the situation, at page nine, and the two findings are inconsistent.

VIII. That the Court erred in failing to find that Judge Hatfield reduced the nineteen counts of the Information to six counts, at the request of the State, pursuant to a suggestion of Judge Hatfield that this would make the case more manageable for trial, as distinguished from an improper filing of nineteen counts.

Said motions will be made and based upon all of the pleadings, records and minutes on file with the Clerk's office.

Dated: May 22, 1978.

MIKE GREELY
Attorney General for the State
of Montana

By Robert S. Keller
Robert S. Keller
Special Assistant Attorney General
State Capitol Building
Helena, Montana 59601

NOTICE OF MOTION

TO JOHN J. CARDEN and GLORIA CARDEN, Petitioners, and MSSRS. WADE J. DAHOOD, Esq. and ROBERT J. EMMONS, Esq., their attorneys, please take notice:

You will please take notice that the Respondent will make the foregoing motions in open court at 9:30 o'clock a.m., on the first day of June, 1978, in the courtroom of the courthouse at Billings, Montana.

Dated: May 22, 1978.

MIKE GREELY
Attorney General for the State of Montana

By Robert S. Keller
Robert S. Keller
Special Assistant Attorney General
State Capital Building
Helena, Montana 59601

CERTIFICATE OF MAILING

I, Robert S. Keller, do hereby certify that on the 22nd day of May, 1978, I served the foregoing motions of Respondent State of Montana, by mailing a true and correct copy of said motions, first-class postage prepaid to:

Wade J. Dahood, Esq.
113 East Third Street
Anaconda, Montana 59711

Robert J. Emmons, Esq.
P. O. Box 2227
Great Falls, Montana 59401

/s/ Robert S. Keller

APPEARANCE FORM

SUPREME COURT OF THE UNITED STATES

No. _____

JOHN J. CARDEN, a/k/a

JAMES J. CARDEN, and
GLORIA (EUSEK) CARDEN,
Petitioners,

THE STATE OF MONTANA,

vs.

Respondent.

The Clerk will enter my appearance as Counsel for JOHN J. CARDEN, a/k/a JAMES J. CARDEN and GLORIA (EUSEK) CARDEN,

who IN THIS COURT Are:

Petitioners.

I certify that I am a member of the Bar of the Supreme Court of the United States:

s/s Wade J. Dahood
WADE J. DAHOOD, ESQ.
KNIGHT, DAHOOD, McLEAN
& EVERETT
113 East Third Street
Anaconda, Montana 59711
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Supreme Court, U. S.
FILED
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No. 80-579

In The

Supreme Court of the United States

October Term, 1980

JOHN J. CARDEN, a/k/a, JAMES J. CARDEN, and GLORIA (EUSEK) CARDEN,

Petitioners,

vs.

THE STATE OF MONTANA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

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No. 80-579

In The

Supreme Court of the United States

October Term, 1980

JOHN J. CARDEN, a/k/a, JAMES J. CARDEN, and GLORIA (EUSEK) CARDEN,

Petitioners,

vs.

THE STATE OF MONTANA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

The respondent, STATE OF MONTANA, respectfully requests this Court to deny the petition for writ of certiorari seeking review of the order of the United States Court of Appeals for the Ninth Circuit in this case.

STATEMENT OF THE CASE

Cardens, the Petitioners, were charged with nineteen felony counts in State court by an information filed on December 20, 1974. On May 11, 1976, prior to trial, they moved the State District Court for an order to dismiss the information for a lack of speedy trial, which was granted on July 28, 1976. Upon appeal to the Montana Supreme Court, the District Court was reversed and the case remanded for trial. A petition for rehearing was denied. Cardens thereupon applied to the Federal District Court for the District of Montana for a writ of habeas corpus along with a motion for a stay of the State court proceedings, which was granted. Subsequently, on September 27, 1977 the Petitioners filed discovery motions to expand the record. Oral argument was heard on the application for the writ on October 28, 1977 and briefs were filed on November 18 and 23, 1977 by the State and the Petitioners. On January 3, 1978 the District Court granted the discovery motions, and on May 12, 1978 granted the writ which enjoined the State from proceeding any further in the criminal prosecution of the Petitioners.

In their petition for a writ of habeas corpus, Cardens alleged that they had exhausted all of their remedies available in the State courts. In its answer, the State of Montana responded:

> "Respondents admit that the Petitioners have exhausted their remedies available in the State Court as to the period of time from the filing of the information untii the Motion to Dismiss for lack of speedy trial was made on May 11, 1976, but deny that the Petitioners have exhausted their remedies for any period of time thereafter;"

The Petitioners have not demanded a speedy trial.

REASONS WHY WRIT OF CERTIORARI SHOULD BE DENIED

I.

Question No. 2 Asserted By Petitioners Does Not Present A Substantial Federal Question Which Has Not Heretofore Been Decided By This Court

Question number 2 posed by the Petitioners was answered by this Court in *Fay v. Noia,* 372 U. S. 391 (1963). It is clear that the exhaustion requirement in habeas corpus proceedings arising from state court prosecutions is a matter of comity and not jurisdiction.

II.

Questions No. 1, 3, and 4 Asserted By Petitioners, Although Raised Below, Are Not Presented By The Facts of Record

The Petitioners contend that in the District Court proceedings the State of Montana admitted that the Petitioners had exhausted their state court remedies and therefore waived its right to challenge the petition on that ground. The State has waived nothing. In its original answer to the petition for a writ of habeas corpus, which is quoted above, it is clear that the State maintained that the Petitioner's had not exhausted all of their state court remedies. Additionally, the Federal District Court, in its initial order, directed the Attorney General of the State of Montana to answer the petition, and specifically directed the Attorney General to address the question of exhaustion of state remedies (C.T., at p. 37). At that time, there was no further state remedy available to the Petitioners for

the period of time covered by their original motion to dismiss for lack of a speedy trial. They would have had to wait until the trial itself to renew the motion. The only concession by the State as to the exhaustion of remedies was for a limited period of time, between the filing of the information and the motion to dismiss for lack of speedy trial.

Exhaustion of remedies for that limited period of time does not equate with the exhaustion of remedies requirement of either 28 U. S. C. section 2241 or 28 U. S. C. section 2254. Total exhaustion of all state court remedies is a condition precedent to Federal intervention pursuant to these sections, and the Cardens have not exhausted all of their state court remedies.

Petitioners represent in Question number 4 that the issue of exhaustion was never raised by the State of Montana in the District Court proceedings and that, as a consequence, the Court of Appeals should not have decided the appeal before it on that issue. The District Court, however, clearly perceived that the State was arguing exhaustion and abstention in its Memorandum and Order (C.T., at p. 313-314). *Braden v. 30th Judicial Circuit Court of Kentucky,* 410 U. S. 484 (1973), *Moore v. DeYoung,* 515 F. 2d 437 (3d Cir., 1975), and *Younger v. Harris,* 401 U. S. 37 (1971), all of which focus upon exhaustion and abstention, were all cited in the initial brief of the State of Montana in opposition to the petition for writ of habeas corpus (C.T., at p. 125). Additionally, the brief of the State in support of its motion to amend the findings of fact and judgment (C.T., at p. 329) directly addressed the question:

> We had no choice but to concede that for the "period of time in question", that period that had been litigated

> by the state district court, there was no further state remedy. But, consistent with *McDonald,* supra, the petitioner had not exhausted his state remedies, for the same motion was still available at the trial level and on appeal. We made this argument in our brief with respect to Stay of Proceedings, and in light of *McDonald,* supra, that argument goes to the heart of exhaustion of remedies. The issue is not was the defendant denied a speedy trial, for a specific period of time, the issue is whether or not he has been denied a speedy trial, and that issue cannot be determined until he has had his trial, and then exhausted state remedies. (C.T., at pp. 330-331)

Likewise, Specification No. 5 of the State's motion to amend findings and judgment (C.T., at p. 232) states:

> 5.) That the Court erred in finding that the petitioners' remedies were exhausted at the state level; that the court should have found that the petitioners' remedies were not exhausted at the state level until there had been a final judgment in the state court.

Questions 1 and 4 asserted by Petitioners are not properly presented by the facts of record. Those facts reveal that the issue of exhaustion of remedies was not waived. It was clearly presented to the Federal District Court by the State of Montana and was not raised for the first time on appeal.

Question number 3 is premised on Petitioners' misunderstanding of speedy trial remedies still available in the State courts. The Petitioners contend that they have exhausted their state court remedies. Their argument is that when the Montana Supreme Court denied their motion to dismiss for failure to grant a speedy trial, and then denied a petition for rehearing, there was no other available procedure by which they could raise the question pre-

sented. Therefore, the Petitioners maintain, State court remedies were exhausted prior to bringing the issue to the Federal courts. The Petitioners do, however, have other remedies available to them. They can still assert a speedy trial defense when, and if, they are brought to trial and upon appeal in the State courts. *Braden v. 30th Judicial Circuit Court of Kentucky,* 410 U. S. 484 (1973). As this Court pointed out in *United States v. McDonald,* 435 U. S. 850 (1978), a speedy trial claim is best reviewed after trial when the court's dismissal is more conclusive and allegations of prejudice are less speculative.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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